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THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2014 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through March 21, 2014. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 21, 2014.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
John Marshall Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2014 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2014 supplement pamphlets and in the bound volumes of the Code.

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REENACTMENT OF CODE

For the Acts reenacting the Official Code of Georgia Annotated, see the editor's notes to Code Section 1-1-1.

CONSTITUTION OF THE UNITED STATES OF AMERICA

[Preamble]

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Law reviews. — For article, "In Celebration of the Constitution," see 19 Ga. St. B.J. 4 (April 2014).

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Former Code 1933, § 79A-907 (see now O.C.G.A. § 16-13-30) was not subject to constitutional attack under this section. Blincoe v. State, 231 Ga. 886, 204 S.E.2d 597 (1974).

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Law reviews. — For comment, "Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records," see 62 Emory L.J. 639 (2013).

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Law reviews. — For note, "DaimlerChrysler v. Cuno: The Supreme Court Hits the Brakes on Determining the Constitutionality of Investment Incentives Given by States to Corporate America," see 58 Mercer L. Rev. 1411 (2007). For note, "Rethinking the Role and Regulation of Private Military Companies: What the United States and United Kingdom Can Learn from Shared Experiences in the War on Terror," see 39 Ga. J. Int'l & Comp. L. 445 (2011). For note, "Foreign States are Foreign States: Why Foreign State-Owned Corporations Are Not Persons Under the Due Process Clause," see 45 Ga. L. Rev. 913 (2011). For note, "A Pharmaceutical Park Place: Why the Supreme Court Should Modify the Scope of the Patent Test for Reverse Payment Deals," see 20 J. Intell. Prop. L. 315 (2013).

For comment, "Pay What You Like — No, Really: Why Copyright Law Should Make Digital Music Free for Noncommercial Uses," see 58 Emory L.J. 1495 (2009). For comment, "Lawless by Design: Jurisdiction, Gender and Justice in Indian Country," see 59 Emory L.J. 1515 (2010).

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3. Power of State to Regulate

County's one-landfill policy under solid waste management plan. — A county's one-landfill policy under its solid waste management plan was not economic protectionism violative of the Commerce Clause of the United States Constitution, because laws favoring local government could be directed toward any number of legitimate goals unrelated to protectionism; the county had concerns regarding, inter alia, the costs and financing of more than one landfill. R&J Murray, LLC v. Murray County, 282 Ga. 740, 653 S.E.2d 720 (2007), cert. denied, 553 U.S. 1053, 128 S. Ct. 2476, 171 L. Ed. 2d 767 (2008).

Section 9.

[Limitations upon Powers of Congress]

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Ex Post Facto Laws

Improper sentence when pre-amendment version of sexual battery statute cited. — Defendant's sentence to five years imprisonment pursuant to the amended version of O.C.G.A. § 16-6-22.1, with regard to defendant's conviction for sexual battery against a child under the age of 16 years, without specific jury finding that conduct for which defendant was convicted occurred after the amendment, was erroneous and required defendant's sentence to be vacated and remanded to the trial court for resentencing; trial court should have required special verdict form that addressed both defendant's pre-amendment and post-amendment conduct to avoid a potential ex post facto violation. Forde v. State, 289 Ga. App. 805, 658 S.E.2d 410 (2008).

Amendment of forcible rape statute meant indictment within statute of limitations. — With regard to a defendant's conviction for forcible rape of the defendant's child during the time the child was 13 through 15 years of age, the trial court correctly concluded that the state had 15 years from the victim's 16th birthday on January 12, 1995, or until January 12, 2010, to prosecute the case noting the extension of the statute of limitation to 15 years as to forcible rape by the 1996 amendment to O.C.G.A. § 17-3-1; therefore, no ex post facto violation occurred since the indictment was filed on January 8, 2008. Duke v. State, 298 Ga. App. 719, 681 S.E.2d 174 (2009), cert. denied, No. S09C1866, 2010 Ga. LEXIS 31 (Ga. 2010).

Section 10.

[Restrictions upon Powers of States]

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2. Criminal

Requirement to renew registration as sex offender not ex post facto. — Defendant's conviction for violating O.C.G.A. § 42-1-12(e)(3) as a result of failing to renew the defendant's registration as a sex offender was upheld on appeal as the requirement to register as a sexual offender under § 42-1-12(e)(3) resulted in a new crime under § 42-1-12(n) and was not an ex post facto law. Frazier v. State, 284 Ga. 638, 668 S.E.2d 646 (2008).

Impairment of Contracts

U.S. Const., Art. I, Sec. X is restricted to the protection of vested rights, etc.

Decision to award a limited liability company fee simple title in real property did not violate the contract impairment clauses in U.S. Const., Art. I, Sec. X and Ga. Const. 1983, Art. I, Sec. I, Para. X as a corporation's rights to the property pursuant to a 1984 tax deed had not vested prior to the effective date of a 1989 amendment of O.C.G.A. § 48-4-48, which operated retrospectively. BX Corp. v. Hickory Hill 1185, LLC, 285 Ga. 5, 673 S.E.2d 205 (2009).

ARTICLE II.

Section 1.

[Executive Power, Election, Qualifications of the President]

Law reviews. — For article, "State Government: Organization of the Executive Branch Generally," see 29 Ga. St. U.L. Rev. 162 (2012).

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[Powers of the President]

RESEARCH REFERENCES

ALR. — Construction and application of appointments clause of United States Constitution, Article II, Section 2, cl. 2, 59 ALR Fed. 2d 1.

ARTICLE III.

Law reviews. — For article, "Limiting Article III Standing to 'Accidental' Plaintiffs: Lessons from Environmental and Animal Law Cases," see 45 Ga. L. Rev. 1 (2010).

Section 1.

[Judicial Power, Tenure of Office]

Law reviews. — For article, "Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court," see 61 Emory L. J. 1 (2011).

Section 2.

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Law reviews. — For comment, "Inappropriate Forum or Inappropriate Law? A Choice of Law Solution to the Jurisdictional Standoff Between the United States and Latin America," see 60 Emory L.J. 1437 (2011).

For note, "Foreign States are Foreign States: Why Foreign State-Owned Corporations Are Not Persons Under the Due Process Clause," see 45 Ga. L. Rev. 913 (2011).

ARTICLE IV.

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[Faith and Credit among States]

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General Consideration

Conviction not precluded based on notice.

Court of appeals erred in ruling that a physician's claims that a limited liability company (LLC) violated the Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-399(b), were not barred by res judicata because the physician was barred by a Texas judgment from filing an FBPA claim against the LLC in Georgia, and a Georgia court could not make its own determination regarding whether the forum selection clause in the parties' agreement precluded the filing of an FBPA claim in Georgia; there was no public policy exception to the Full Faith and Credit Clause, and the Texas judgment went to the merits of, and adversely controlled, the physician's claim that the forum selection clause was inapplicable to an FBPA claim. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489 (2011).

Section 2.

[Privileges and Immunities, Fugitives]

Law reviews. — For article, "The Original Meaning of the Privileges and Immunities Clause," see 43 Ga. L. Rev. 1117 (2009).

ARTICLE VI.

[Debts, Supremacy, Oath]

Law reviews. — For annual survey on product liability, see 64 Mercer L. Rev. 231 (2012).

AMENDMENTS TO THE CONSTITUTION

[Amendment I]

[Freedom of Religion, of Speech, and of the Press]

Cross references. — Exercise of rights of freedom of speech and right to petition government for redress of grievances; legislative findings; verification of claims; definitions; procedure on motions; exception; attorney's fees and expenses, § 9-11-11.1. Adult's reliance on prayer or religious nonmedical means of treatment of dependent, § 15-11-107. Invasion of privacy through electronic mediums, Pt. 3, C. 11, T. 16. Statement of rights under federal law, § 34-6-20.1.

Law reviews. — For article, "Shame, Rage and Freedom of Speech: Should the United States Adopt European 'Mobbing' Laws?," see 35 Ga. J. Int'l & Comp. L. 53 (2006). For article, "The Foundations and Frontiers of Religious Liberty: A Symposium Convened by The Center for the Study of Law and Religion at Emory University Sponsored by The Henry R. Luce Foundation," see 21 Emory Int'l L. Rev. 43 (2007). For article, "Freedom of the Press 2.0," see 42 Ga. L. Rev. 309 (2008). For article, "Advancing the Consensus: 60 Years of the Universal Declaration of Human Rights: Defamation of Religions: The End of Pluralism?," see 23 Emory Int'l L. Rev. 69 (2009). For article, "Constitutional Narratives: Constitutional Adjudication on the Religion Clauses in Australia and Malaysia," see 23 Emory Int'l L. Rev. 437 (2009). For article, "Religious Freedom, Democracy, and International Human Rights," see 23 Emory Int'l L. Rev. 583 (2009). For article, "Sex In and Out of Intimacy," see 59 Emory L.J. 809 (2010). For article, "The Most Important (and Best) Supreme Court Opinions and Justices," see 60 Emory L.J. 408 (2010). For article, "A New Conception of Israeli Grundnorm: The Jewish Immigration 'Trump Card' as the Solution to the Falasha Mura Exception," see 24 Emory Int'l L. Rev. 357 (2010). For article, "Terrorism, Historical Analogies, and Modern Choices," see 24 Emory Int'l L. Rev. 589 (2010). For article, "'I'm Not Gay, M'Kay?': Should Falsely Calling Someone a Homosexual be Defamatory?," see 44 Ga. L. Rev. 739 (2010). For article, "Defense Against Outrage and the Perils of Parasitic Torts," see 45 Ga. L. Rev. 107 (2010). For article, "Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases," see 26 Ga. St. U.L. Rev. 321 (2010). For article, "The Future of Music: Reconfiguring Public Performance Rights," see 17 J. Intell. Prop. L. 207 (2010). For article, "Practice Point: Right of Publicity: A Practitioner's Enigma," see 17 J. Intell. Prop. L. 351 (2010). For article, "Religious Symbols on Government Property: Lift High the Cross? Contrasting the New European and American

Cases on Religious Symbols on Government Property," see 25 Emory Int'l L. Rev. 5 (2011). For article, "Noah's Curse: How Religion Often Conflates Status, Believe, and Conduct to Resist Antidiscrimination Norms," see 45 Ga. L. Rev. 657 (2011). For article, "Deporting Families: Legal Matter or Political Question?," see 27 Ga. St. U.L. Rev. 489 (2011). For article, "Bullying in Public Schools: The Intersection Between the Student's Free Speech Rights and the School's Duty to Protect," see 62 Mercer L. Rev. 407 (2011). For article, "The Constitutional Right not to Kill," see 62 Emory L.J. 121 (2012). For article, "State Government: Open and Public Meetings," see 29 Ga. St. U.L. Rev. 139 (2012). For article, "Public Officers and Employees: Division of Archives and History," see 29 Ga. St. U.L. Rev. 214 (2012). For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012). For annual survey on local government law, see 64 Mercer L. Rev. 213 (2012). For annual survey on real property, see 64 Mercer L. Rev. 255 (2012). For article, "Practice Point: You Look Complicated Today: Representing an Illegal Graffiti Artist in a Copyright Infringement Case Against a Major International Retailer," see 20 J. Intell. Prop. L. 75 (2012). For article, "Having it Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools," see 63 Emory L. J. 303 (2013). For article, "Watson, Walton, and the History of Legal Transplants," see 41 Ga. J. Int'l & Comp. L. 637 (2013). For article, "(Mis)Conceptions of the Corporation," see 29 Ga. St. U.L. Rev. 731 (2013). For article, "Narrative Pluralism and Doctrinal Incoherance in Hosanna-Tabor," see 64 Mercer L. Rev. 405 (2013). For article, "Employment Discrimination," see 64 Mercer L. Rev. 891 (2013). For article, "Evil Angel Eulogy: Reflections on the Passing of the Obscenity Defense in Copyright," see 20 J. Intell. Prop. L. 209 (2013). For article, "How Law Made Silicon Valley," see 63 Emory L. J. 239 (2014). For article, "Terrorism and Associations," see 63 Emory L. J. 581 (2014). For article, "The Efficacy of Cybersecurity Regulation," see 30 Ga. St. U.L. Rev. 287 (2014). For article, "Sentencing Adjudication: Lessons from Child Pornography Policy Nullification," see 30 Ga. St. U.L. Rev. 375 (2014).

For note, "Balancing the First Amendment And Child Protection Goals in Legal Approaches to Restricting Children's Access to Violent Video Games: A Comparison of Germany And the United States," see 34 Ga. J. Int'l & Comp. L. 743 (2006). For note, "Learning Lessons from Multani: Considering Canada's Response to Religious Garb Issues in Public Schools," see 36 Ga. J. Int'l & Comp. L. 159 (2007). For note, "Official, National, Common or Unifying: Do Words Giving Legal Status to Language Diminish Linguistic Human Rights?," see 36 Ga. J. Int'l & Comp. L. 221 (2007). For note, "The 'Scope of a Student': How to Analyze Student Speech in the Age of the Internet," see 42 Ga. L. Rev. 1127 (2008). For casenote, "Signed, Your Coach: Restricting Speech in Athletic Recruiting in Tennessee Secondary School Athletic Ass'n v. Brentwood Academy," see 59 Mercer L. Rev. 1027 (2008). For note, "A Bridge Too Far? Directive 1344.10 and the Military's Inroads on Core Political Speech in Campaign Media," see 44 Ga. L. Rev. 837 (2010). For note, "Defending Against a Charge of Obscenity in the Internet Age: How Google Searches Can Illuminate Miller's 'Contemporary Community Standards'," see 26 Ga. St. U.L. Rev. 1029 (2010). For note, "The Thrill of Victory, and the Agony of the Tweet: Online Social Media, the Non-Copyrightability of Events, and How to Avoid a Looming Crisis by Changing Norms," see 17 J. Intell. Prop. L. 445 (2010). For note, "An 'Exception' — Ally Difficult Situation: Do the Exceptions, or Lack Thereof, to the 'Speech-and-Display Requirements' for Abortion Invalidate Their Use as Informed Consent?," see 30 Ga. St. U. L. Rev. 521 (2014). For note, "Bay Area Rapid Transit Actions of August 11, 2011: How Emerging Digital Technologies Intersect with First Amendment Rights," see 29 Ga. St. U.L. Rev. 783 (2013).

For comment, "Thou Shalt Not Reorganize: Sacraments for Sale First Amendment Prohibitions and Other Complications of Chapter 11 Reorganization for Religious Institutions," see 22 Bank. Dev. J. 293 (2005). For comment, "It's Still

Good to be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity," see 21 Emory Int'l L. Rev. 413 (2007). For comment, "Implementation of the UK Terrorism Act 2006 - The Relationship Between Counterterrorism Law, Free Speech, and the Muslim Community in the United Kingdom versus the United States," see 21 Emory Int'l L. Rev. 711 (2007). For comment, "Unexcused Absence: Why Public Schools in Religiously Plural Society Must Save a Seat for Religion in the Curriculum," see 56 Emory L.J. 1431 (2007). For comment, "The Case for the Selective Disincorporation of the Establishment Clause: Is Everson a Super-Precedent?," see 56 Emory L.J. 1701 (2007). For comment, "Drafting Glitches in the Religious Liberty and Charitable Donation Protection Act of 1998: Amend § 548(A)(2) of the Bankruptcy Code," see 24 Bank. Dev. J. 159 (2008). For comment, "Gag Me with a Rule of Ethics: BAPCPA's Gag Rule and the Debtor Attorney's Right to Free Speech," see 24 Bank. Dev. J. 227 (2008). For comment, "Comment: Is Worship a Unique Subject or a Way of Approaching Many Different Subjects?: Two Recent Decisions that Attempt to Answer This Question Set the Second and Ninth Circuits on a Course Toward State Entanglement With Religion," see 59 Mercer L. Rev. 1319 (2008). For comment, "'An Era of Human Zoning': Banning Sex Offenders from Communities Through Residence and Work Restrictions," see 57 Emory L.J. 1347 (2008). For comment, "'Just Say No' to Pro-Drug and Alcohol Student Speech: The Constitutionality of School Prohibitions of Student Speech Promoting Drug and Alcohol Use," see 57 Emory L.J. 1259 (2008). For comment, "Blessed be the Name of the Code: How to Protect Churches from Tithe Avoidance under the Bankruptcy Code's Fraudulent Transfer Law," see 25 Emory Bankr. Dev. J. 599 (2009). For comment, "You've Got Libel: How the Can-Spam Act Delivers Defamation Liability to Spam-Fighters and Why the First Amendment Should Delete the Problem," see 58 Emory L.J. 1013 (2009). For comment, "Pay What You Like — No, Really: Why Copyright Law Should Make Digital Music Free for Noncommercial Uses," see 58 Emory L.J. 1495 (2009). For comment, "I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex Relationships," see 59 Emory L.J. 259 (2009). For comment, "Protecting Preachers from Prejudice: Methods for Improving Analysis of the Ministerial Exception to Title VII," see 59 Emory L.J. 1297 (2010). For comment, "When News Doesn't Want to be Free: Rethinking 'Hot News' to Help Counter Free Riding on Newspaper Content Online," see 60 Emory L.J. 537 (2010). For comment, "You Better Smile When You Say 'Cheese!': Whether the Photograph Requirement for Drivers' Licenses Violates the Free Exercise Clause of the First Amendment," see 61 Mercer L. Rev. 611 (2010). For comment, "For God and Money: The Place of the Megachurch Within the Bankruptcy Code," see 27 Emory Bankr. Dev. J. 609 (2011). For comment, "Smoking Out Big Tobacco: Can the Family Smoking Prevention and Tobacco Control Act Equip the FDA to Regulate Tobacco Without Infringing on the First Amendment?," see 60 Emory L.J. 705 (2011). For comment, "Room for Error Online: Revising Georgia's Retraction Statute to Accommodate the Rise of Internet Media," see 28 Ga. St. U.L. Rev. 923 (2012). For comment, "When the Eyes and Ears Become an Arm of the State: The Danger of Privatization through Government Funding of Insular Religious Groups," see 62 Emory L. J. 1411 (2013). For comment, "Tilted Scales of Justice? The Consequences of Third-Party Financing of American Litigation," see 63 Emory L. J. 489 (2013). For comment, "Pacifism in a Dog-Eat-Dog World: Potential Solutions to School Bullying," see 64 Mercer L. Rev. 753 (2013). For comment, "You Don't Have to, But It's in Your Best Interest: Requiring Express Ideological Statements as Conditions on Federal Funding," see 29 Ga. St. U.L. Rev. 1129 (2013). For comment, "Saving the Deific Decree Exception to the Insanity Defense in Illinois: How a Broad Interpretation of 'Religious Command' May Cure Establishment Clause Concerns," see 46 J. Marshall L. Rev. 56 (2013). For article, "The Campaign Finance Safeguards of Federalism," see 63 Emory L. J. 781

(2014). For comment, "By the Power Vested in Me? Licensing Religious Officials to Solemnize Marriage in the Age of Same-Sex Marriage," see 63 Emory L. J. 979 (2014).

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ANALYSIS

Scope and Purpose

3. Overbroad Legislation

Vagueness finding reversed where party lacked standing to challenge constitutionality of county zoning provision. — Because a lessor and a lessee did not preserve an "as applied" challenge to two county zoning code provisions, did not seek a special use permit, and lacked standing to make a constitutional challenge, the trial court erred in finding the provisions unconstitutionally vague, regardless of whether they had an otherwise viable facial challenge. Catoosa County v. R.N. Talley Props., LLC, 282 Ga. 373, 651 S.E.2d 7 (2007).

Freedom of Religion

2. State Actions Affecting Religion

Jurisdiction over church property dispute.

Georgia trial court did not violate the principle of separation of church and state by exercising jurisdiction in a civil case brought by a church and the church's board of deacons against the pastor and others to have the pastor removed and to have the pastor relinquish control of the church's property because the trial court did not involve itself in ecclesiastical matters when it ordered that persons eligible to vote on whether to retain or discharge the pastor were limited to those in membership with the church under the church's existing bylaws. Further, because the petition in the case involved a dispute over the control of church property, it presented a civil matter over which the trial court had jurisdiction. Smith v. Mount Salem Missionary Baptist Church, 289 Ga. App. 578, 657 S.E.2d 642 (2008).

6. Schools and Education

Not subject to strict scrutiny standard of review. — Strict scrutiny review should not have been applied to plaintiff school board members' challenges under the First and Fourteenth Amendments to O.C.G.A. § 20-2-51(c)(2) because the statute's nepotism provision prohibited plaintiffs only from running for the school board in districts where certain family members were employed, but the statute did not otherwise impair plaintiffs' right to run for office or to vote; plaintiffs' injury was not so severe as to require strict scrutiny. Plaintiffs' claims that the statute was both too narrow and overbroad also failed; that the statute did not prevent nepotism in all its possible forms did not heighten the severity of the restriction to necessitate strict scrutiny. Grizzle v. Kemp, 634 F.3d 1314 (11th Cir. 2011).

Freedom of Speech and Press

1. In General

Assisted suicide. — O.C.G.A. § 16-5-5(b) is unconstitutional under the free speech provisions of the United States and Georgia Constitutions, U.S. Const., amend. I and Ga. Const. 1983, Art. I, Sec. I, Para. V, because it is not all assisted suicides that are criminalized but only those that include a public advertisement or offer to assist; because the state failed to provide any explanation or evidence as to why a public advertisement or offer to assist in an otherwise legal activity was sufficiently problematic to justify an intrusion on protected speech rights, it could not, consistent with the United States and Georgia Constitutions, make the public advertisement or offer to assist in a suicide a criminal offense. Final Exit Network, Inc. v. State, 290 Ga. 508, 722 S.E.2d 722 (2012).

5. Broadcasting

Names and likeness of public figures in fictionalized dramatization. — Because racehorse trainer and jockey were public figures, federal district court construed their invasion of privacy claims against filmmakers who used actors to portray them in a movie about a racehorse's career as right of publicity claims and held that use of their names and likenesses in a fictionalized dramatization of past newsworthy events was protected by the First Amendment. Thoroughbred Legends, LLC v. Walt Disney Co., No. 1:07-CV-1275-BBM, 2008 U.S. Dist. LEXIS 19960 (N.D. Ga. Feb. 12, 2008).

6. Employer — Employee Relations

Rule prohibiting police officer from criticizing superior.

Under the Pickering balancing test for evaluating public employee speech restrictions, a county's questioning of officers about their off-duty union activities while conducting a disciplinary investigation of the local police union's president for "mutinous" comments the president made about replacing the incumbent police chief violated the First Amendment because it had a chilling effect on associational rights. Local 491 v. Gwinnett County, 510 F. Supp. 2d 1271 (N.D. Ga. 2007).

8. Obscenity

Obscene language directed at police officer.

When an arrestee allegedly called an officer "a fucking asshole" and was arrested, the officer was properly denied summary judgment based on qualified immunity as to the arrestee's claims under the Fourth Amendment because the officer did not have arguable probable cause to arrest the arrestee for disorderly conduct under Georgia law since the arrestee was not shouting and did not appear to be a danger to anyone as the arrestee walked away. Merenda v. Tabor, No. 12-12562, 2013 U.S. App. LEXIS 2351 (11th Cir. Feb. 1, 2013).

9. Political Activities

Policy restricting wearing of police uniforms at commission meetings. — Applying the Schacht standard rather than the Pickering standard, a federal district court held that a county's policy restricting expressive conduct, i.e., the wearing of police uniforms by officers speaking at county commission meetings, which had been enforced evenhandedly and in a content-neutral fashion, did not unconstitutionally abridge the First Amendment's free speech guarantee, either facially or as applied. Local 491 v. Gwinnett County, 510 F. Supp. 2d 1271 (N.D. Ga. 2007).

Redistricting attempting to interfere with right of school board member to hold office or vote. — While voting rights and the right to run for public office are core constitutional rights, an attempted deprivation of constitutional or statutory rights is not the same as an actual deprivation. Furthermore, incurring legal fees to vindicate rights does not itself establish that those rights were violated. Thus, plaintiff, a school board member, pursing attempted violations of plaintiff's right to run and hold a designated seat in a predefined district, could not succeed as an injunction in another lawsuit and failure of preclearance interfered with the implementation of the efforts of defendants, the local voting reg-

istrars; since the attempt to deprive plaintiff of plaintiff's constitutional rights did not succeed, neither can plaintiff's lawsuit succeed. Cook v. Randolph County, 573 F.3d 1143 (11th Cir. 2009).

Views expressed at public meetings. — First Amendment to the U.S. Constitution was not violated by the arrest of citizens who attended a city council meeting to express views on renaming a public park but were disruptive because the mayor's attempts to control the arrestees' conduct was not based on disapproval of the arrestees' viewpoints but on a desire to maintain order; therefore, it was content-neutral. Harris v. City of Valdosta, 616 F. Supp. 2d 1310 (M.D. Ga. 2009).

12. Commercial Speech

City sign ordinance, etc.

County ordinance which prohibited off-premise signs in commercially-zoned areas, including all commercial signs, and then permitted the county to decide on a case-by-case basis which signs were allowed, violated the First Amendment. By initially declaring all signs as illegal and allowing the county to exempt from the ban only on a case-by-case basis, the ordinance was more extensive than was necessary to protect against misleading commercial speech and provided insufficient protection for protected speech, both commercial and otherwise. Fulton County v. Galberaith, 282 Ga. 314, 647 S.E.2d 24 (2007).

Trial court properly granted summary judgment to a city in a suit brought by an outdoor sign company challenging the constitutionality of the city's sign ordinance as the company's sign applications failed to meet the city's height and size restrictions and the restrictions were constitutional. Since the company lacked standing to challenge any other provision of the ordinance, the trial court should not have addressed the company's constitutional arguments concerning other provisions of the ordinance, though that appellate court determination did not change the grant of summary judgment to the city. Granite State Outdoor Adver., Inc. v. City of Roswell, 283 Ga. 417, 658 S.E.2d 587 (2008), cert. denied, 129 S. Ct. 222, 172 L.Ed.2d 143 (2008).

14. Criminal Matters

Nude photos of murder victim. — Publishing 20-year-old nude photos of an aspiring model who later became a professional wrestler and whose murder was highly publicized did not fall within Georgia's right of publicity newsworthiness exception; the photos were unrelated to the incident of public concern, the model's death, and thus, a right of publicity case filed by plaintiff, the mother and personal representative for the daughter's estate, against defendant publisher, could be pursued; under the First Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. V, every private fact disclosed in an otherwise truthful, newsworthy publication had to have some substantial relevance to a matter of legitimate public interest in order to fall within the newsworthiness exception. Toffoloni v. LFB Publ'g Group, 572 F.3d 1201 (11th Cir. 2009), cert. denied, mot. granted, 130 S. Ct. 1689, 176 L. Ed. 2d 206 (2010).

Constitutionality of false statement statute. — False statement statute, O.C.G.A. § 16-10-20, when properly construed to require that the defendant make the false statement with knowledge and intent that the statement may come within the jurisdiction of a state or local government agency, is constitutional because correctly interpreted, the statute raises no substantial constitutional concern on the statute's face; the statute requires a defendant to know and intend, that is, to contemplate or expect, that his or her false statement will come to the attention of a state or local department or agency with the authority to act on the statement, and as properly construed, O.C.G.A. § 16-10-20 may only be applied to conduct that persons of common intelligence would know was wrongful because it could result in harm to the government. Haley v. State, 289 Ga. 515, 712 S.E.2d 838 (2011), cert. denied, U.S. , 133 S. Ct. 60, 183 L. Ed. 2d 711 (2012).

Freedom of Association

Constitutionality of Georgia Street

Gang Terrorism and Prevention Act. — Trial court properly denied the appellants' motion to dismiss various counts charging the appellants with gang-related crimes under the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., since properly construed O.C.G.A. § 16-15-4(a) did not directly or indirectly infringe upon the First Amendment right to freedom of association as, to support a conviction, gang conduct or participation was required. Further, reading of § 16-15-4(a) according to the natural and obvious import of the statute's language and in conjunction with the specific definitions in O.C.G.A. § 16-15-3, the statute provided a sufficiently definite warning to persons of ordinary intelligence of the prohibited conduct and was not susceptible to arbitrary and discriminatory enforcement and did not reach a substantial amount of constitutionally protected conduct, thus, the statute was not unconstitutionally vague or overbroad. Rodriguez v. State, 284 Ga. 803, 671 S.E.2d 497 (2009).

Street Gang Terrorism and Prevention Act does not violate the right to freedom of association. — Appellant, a juvenile, was not entitled to the dismissal of two counts of street gang criminal activity based on the juvenile's contention that the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., was overbroad because the statute criminalized the constitutionally protected freedom of association; criminal gang activity was not a protected activity even when committed by a group exercising the group's constitutional right to free association. In re K.R.S., 284 Ga. 853, 672 S.E.2d 622 (2009).

ADVISORY OPINIONS OF THE STATE BAR

Free speech rights not limited by restrictions on advertising of legal services. — It is ethically improper for a lawyer to advertise for legal business with the intention of referring a majority of that business out to other lawyers without disclosing that intent in the advertisement and without complying with the disciplinary standards of conduct applicable to lawyer referral services. Adv. Op. No. 05-6 (May 3, 2007).

[Amendment II]

[Right to Keep and Bear Arms]

Cross references. — Prohibition on seizure of firearms during declared state of emergency, § 38-3-37.

Law reviews. — For article, "Why Annie Gets to Keep Her Gun: An Analysis of Firearm Exemptions in Bankruptcy Proceedings," 21 Emory Bankr. Dev. J. 553 (2005). For article, "Partisans, Pirates, and Pancho Villa: How International and National Law Handled Non-State Fighters in the 'Good Old Days' Before 1949 and that Approach's Applicability to the 'War on Terror'," see 24 Emory Int'l L. Rev. 549 (2010). For article, "Sale, Use, and Possession of Firearms: Offenses Against Public Order and Safety," see 30 Ga. St. U.L. Rev. 231 (2013).

JUDICIAL DECISIONS

Amendment applies to federal, not state, legislative efforts.

When plaintiffs, a gun advocacy group and one of the group's members, and a church and the pastor, sought a declaratory judgment that O.C.G.A. § 16-11-127(b)(4), regulating possession of weapons in a place of worship, violated their Second Amendment right to bear arms, the court noted that the United States Supreme Court, in District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783 (2008), held that the Second Amendment protected a right to possess and

carry weapons for self defense but did not elaborate on what all the "sensitive" places were to which a regulation could prohibit carrying a weapon, and absent clearer guidance, the safer approach was to assume that possession at a place of worship was within the Second Amendment guarantee and apply intermediate scrutiny, and since prohibiting firearms in a place of worship bore a substantial relationship to the important goal of protecting religious freedom by protecting attendees from the fear or threat of intimidation or armed attack; thus, § 16-11-127(b)(4) passed intermediate scrutiny and the claim against defendants, the State of Georgia, the Governor, a county, and a county manager failed. GeorgiaCarry.Org, Inc. v. Georgia, 764 F. Supp. 2d 1306 (M.D. Ga. 2011), aff'd, 687 F.3d 1244 (11th Cir. Ga. 2012).

Statute regulating public carrying not unconstitutional. — O.C.G.A. § 16-11-129, which regulated the ability of citizens to carry a weapon in public, was justified by the goal to protect the safety of individuals who are in public places, which was a legitimate and compelling government interest. The statute was not unconstitutional as applied to an applicant who pled nolo contendre to violent felonies in Florida more than 20 years earlier, under either U.S. Const., amend. II or Ga. Const. 1983, Art. I, Sec. I, Para. VIII. Hertz v. Bennett, 294 Ga. 62, 751 S.E.2d 90 (2013).

[Amendment IV]

[Security from Unwarrantable Search and Seizure]

Law reviews. — For article, "Redefining the Right to Be Let Alone: Privacy Rights and the Constitutionality of Technical Surveillance Measures in Germany and the United States," see 35 Ga. J. Int'l & Comp. L. 433 (2007). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For article, "Pay to Play: The Poor's Problems in the BAPCPA," see 25 Emory Bankr. Dev. J. 407 (2009). For article, "The Fourth Amendment and Computers: Is a Computer Just Another Container or Are New Rules Required to Reflect New Technologies?," see 14 (No. 5) Ga. St. B.J. 15 (2009). For article, "The Most Important (and Best) Supreme Court Opinions and Justices," see 60 Emory L.J. 408 (2010). For article, "Terrorism, Historical Analogies, and Modern Choices," see 24 Emory Int'l L. Rev. 589 (2010). For article, "Congressional End-Run: The Ignored Constraint on Judicial Review," see 45 Ga. L. Rev. 211 (2010). For article, "Conditional Rules in Criminal Procedure: Alice in Wonderland Meets the Constitution," see 26 Ga. St. U.L. Rev. 417 (2010). For article, "Herring v. United States: The Continued Erosion of the Exclusionary Rule," see 61 Mercer L. Rev. 663 (2010). For article, "Police Mistakes of Law," see 61 Emory L. J. 69 (2011). For article, "The Political Economy of Criminal Procedure Litigation," see 45 Ga. L. Rev. 721 (2011). For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012). For annual survey on evidence law, see 64 Mercer L. Rev. 137 (2012). For article, "Students, Security, and Race," see 63 Emory L. J. 1 (2013). For article, "(Mis)Conceptions of the Corporation," see 29 Ga. St. U.L. Rev. 731 (2013). For article, "Clever Contraband: Why Illinois' Lockstep with the U.S. Supreme Court Gives Police Authority to Search the Bowels of Your Vehicle," see 47 J. Marshall L. Rev. 425 (2014).

For note, "How Are Local Governments Responding to Student Rental Problems in University Towns in the United States, Canada, and England?," see 33 Ga. J. Int'l & Comp. L. 497 (2005). For note, "Hey Officer, Didn't Someone Teach You To Knock? The Supreme Court Says No Exclusion of Evidence for Knock-and-Announce Violations in Hudson v. Michigan," see 58 Mercer L. Rev. 779 (2007). For note, "Georgia v. Randolph: What to do With a Yes from One but not from Two?," see 58 Mercer L. Rev. 1429 (2007). For note and comment, "Lying to Catch the Bad Guy: The Eleventh Circuit's Likely Adoption of the Clear Error Standard of Review for a Denial of a Frank's Hearing," see 24 Ga. St. U.L. Rev.

843 (2008). For note, "Bringing an End to Warrantless Cell Phone Searches," see 42 Ga. L. Rev. 1165 (2008). For note, "The Online Zoom Lens: Why Internet Street-Level Mapping Technologies Demand Reconsideration of the Modern-Day Tort Notion of 'Public Privacy'," see 43 Ga. L. Rev. 575 (2009). For note, "Imprisoned by Liability: Why Bivens Suits Should Not be Available Against Employees of Privately Run Federal Prisons," see 45 Ga. L. Rev. 1127 (2011).

For comment, "The Sliding Scale Approach to Protecting Nonresident Immigrants against the Use of Excessive Force in Violation of the Fourth Amendment," see 22 Emory Int'l L. Rev. 247 (2008). For comment, "School Bullies — They Aren't Just Students: Examining School Interrogations and the Miranda Warning," see 59 Mercer L. Rev. 731 (2008). For comment, "The British Invasion (Of Privacy): DNA Databases in the United Kingdom and United States in the Wake of the Marper Case," see 23 Emory Int'l L. Rev. 609 (2009). For comment, "A 'Fundamental' Problem: The Vulnerability of Intellectual Property Licenses in Chapter 15 and the Meaning of § 1506," see 28 Emory Bankr. Dev. J. 177 (2011). For comment, "From Backpacks to Blackberries: (Re)Examining New Jersey v. T.L.O. in the Age of the Cell Phone," see 61 Emory L. J. 111 (2011). For comment, "Big Brother Gets a Makeover: Behavioral Targeting and the Third-Party Doctrine," see 61 Emory L.J. 555 (2012). For comment, "Testing Our Teachers," 61 Emory L.J. 1493 (2012). For comment, "Drawing the Line: DNA Databasing at Arrest and Sample Expungement," see 29 Ga. St. U.L. Rev. 1063 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration

Cited in McClure v. Kemp, 285 Ga. 801, 684 S.E.2d 255 (2009).

Expectation of Privacy

Recorded conversations while in jail. — Recordings of telephone conversations the defendant had with the defendant's mother while the defendant was in jail were properly admitted into evidence; the Miranda warnings against self-incrimination did not apply because there was no interrogation, and the defendant had no reasonable expectation of privacy in the calls under the Fourth Amendment. Preston v. State, 282 Ga. 210, 647 S.E.2d 260 (2007).

Motel room.

Two defendants had a reasonable expectation of privacy in a motel room and the room's safe because the defendants were staying there overnight and had clothing there, although neither was a registered guest, so that the defendants both had standing under O.C.G.A. § 17-5-30(a) to object to a search of the room. Because the male guest was illegally detained, that guest's consent to search the room was not valid. State v. Woods, 311 Ga. App. 577, 716 S.E.2d 622 (2011).

Guests in a rented home. — Trial court erred in granting three defendants' motion to suppress evidence seized from a rental home because, whether or not the landlord could consent to the search, the defendants had no standing to contest the search and no expectation of privacy at the rental home, which was not leased to the guests, and when there was no evidence that the guests lived there. State v. Carter, 305 Ga. App. 814, 701 S.E.2d 209 (2010).

Places and Things to Which Right Extends

Threshold of one's dwelling. — An officer may arrest a suspect without an arrest warrant if an offense has been committed in the officer's presence and while an officer generally must have a search warrant or consent to enter a home to make an arrest, an officer can enter a home to arrest a suspect when the officer has followed the suspect there in "hot pursuit." A suspect may not defeat an arrest which has been set in motion in a public place ... by the expedient of escaping to a private place. For Fourth Amendment purposes, one who is in the threshold of one's dwelling is in a public place and not within the dwelling. Lawson v. State, 299 Ga. App. 865, 684 S.E.2d 1 (2009), cert. dismissed, No. S10C0118, 2010 Ga. LEXIS 206 (Ga. 2010); cert. denied, No. S10C0117, 2010 Ga. LEXIS 195 (Ga. 2010).

Wooded area not part of curtilage. — In a woods 50 yards from the defendant's home, police found items used to manufacture methamphetamine under a tarp. The wooded area where the contraband was found was not so closely tied to the defendant's home as to warrant protection as curtilage under the Fourth Amendment. Minor v. State, 298 Ga. App. 391, 680 S.E.2d 459 (2009).

Search of passengers on commercial bus. — Trial court properly denied a defendant's motion to suppress evidence of drugs found in a bag that the defendant acknowledged belonged to the defendant during a bus search conducted by the Motor Carrier Compliance Division of the Georgia Department of Motor Vehicle Safety as the defendant was not in custody when the defendant answered an officer's questions that the bag belonged to the defendant and that the officer could search the bag. As a result, no seizure under the Fourth Amendment occurred, and it was not necessary for the officer to advise the defendant of the defendant's Miranda rights since no arrest or seizure took place. Solano-Rodriguez v. State, 295 Ga. App. 896, 673 S.E.2d 351 (2009).

Commercial premises.

Night club and owner's U.S. Const.,

amends. IV, XIV and Ga. Const. 1983, Art. I, Sec. I, Para. XIII claims against two police officers survived summary judgment where the club and the owners alleged that the officers entered the club without a warrant, probable cause, or exigent circumstances, ordered the lights turned on and the music stopped, frisked the club's patrons and handcuffed some of them without making any arrests, and acted in an intimidating manner. Illusions of the South, Inc. v. City of Valdosta, No. 7:07-cv-6 (HL), 2009 U.S. Dist. LEXIS 27154 (M.D. Ga. Mar. 30, 2009).

"Pinging" cellular phone to locate defendant. — Defendant's counsel was not ineffective for failing to object that the defendant's Fourth Amendment rights were violated when police requested, without a warrant, that defendant's cellular telephone provider "ping" defendant's phone in order to locate the defendant, because the defendant was only "pinged" while traveling in a vehicle, in which defendant had no expectation of privacy. Devega v. State, 286 Ga. 448, 689 S.E.2d 293 (2010).

Briefcases. — Independent source doctrine did not apply in a situation in which an allegedly illegal seizure of a briefcase containing incriminating evidence of a defendant engaged in sex acts with a 15-year-old victim, that had been left by the defendant with a friend, was followed by a legal search of the briefcase pursuant to a warrant. Wilder v. State, 290 Ga. 13, 717 S.E.2d 457 (2011).

Search of lost wallet. — Trial court erred in denying defendant's motion to suppress the drug evidence found in defendant's wallet, which defendant lost at a concert, and the shell of a plastic pen in defendant's pocket after being searched, since by losing the wallet and not abandoning the wallet, defendant never lost the expectation of privacy regarding the wallet. Wolf v. State, 291 Ga. App. 876, 663 S.E.2d 292 (2008).

Visitor has no expectation of privacy in hotel room. — In a prosecution for, inter alia, felony murder, a defendant did not have standing to suppress the evidence of a gun recovered from a hotel room pursuant to a search warrant as the defendant was not the registered guest at the hotel but merely visited the guest on three occasions and, thus, had no reasonable expectation of privacy in the room. Watkins v. State, 285 Ga. 107, 674 S.E.2d 275 (2009).

Order suppressing evidence seized from a hotel room was error because the defendant was a mere invitee visiting the room and, under O.C.G.A. § 17-5-30(a), only a person aggrieved by an unlawful search and seizure was permitted to move to suppress evidence; the defendant had no reasonable expectation of privacy in the hotel room searched, and thus the defendant was not "aggrieved" by the search within the meaning of § 17-5-30(a) and the Fourth Amendment and lacked standing to contest the search. State v. Carter, 299 Ga. App. 3, 681 S.E.2d 688 (2009).

Search of desk at work. — Trial court erred by failing to suppress the evidence seized by the police from defendant's desk at work and concluding that no warrant was required for the search of the desk because it was unlocked and was in a workspace shared by numerous coworkers. A warrant was required for the search of the desk and, since the warrant authorizing the search was issued without a showing of probable cause based on the tip of an unidentified caller, and there was no exception to the warrant requirement shown, the fruits of the search of the desk had to be suppressed. Harper v. State, 283 Ga. 102, 657 S.E.2d 213 (2008).

Statement by juvenile questioned by school official, who was agent of state. — Juvenile court properly suppressed one incriminating statement made by a juvenile, regarding the robbery of two students in a bathroom during a basketball game, as the juvenile was questioned by an agent of the police with the involvement and participation of the school resource officer. Further, the juvenile was in custody and, thus, entitled to Miranda warnings, which had not been given. In the Interest of T.A.G., 292 Ga. App. 48, 663 S.E.2d 392 (2008).

Outbuildings. — With regard to a defendant's convictions for sexual abuse of a child, the trial court properly denied the defendant's motion to suppress various items found in an outbuilding that the defendant, the victim, and the victim's

parent had been living in as the owners of the outbuilding consented to the entry by the police as well as had brought certain items to the police themselves. The defendant's failure to retrieve the items for over three months, despite repeated requests on the part of the owners to get the items, as well as the defendant moving out of state sufficiently established that the defendant had abandoned the property, thus, no illegal search and seizure was possible. Driggers v. State, 295 Ga. App. 711, 673 S.E.2d 95 (2009).

Public meetings. — Fourth Amendment to the U.S. Constitution was not violated by the arrest of citizens who attended a city council meeting to express views on renaming a public park but refused to obey the rules of order because probable cause to arrest existed, even though O.C.G.A. § 16-11-34, which criminalized the disruption of a public meeting, was later struck down as unconstitutionally overbroad. Harris v. City of Valdosta, 616 F. Supp. 2d 1310 (M.D. Ga. 2009).

Searching home of sibling. — Warrantless search of a defendant's sister's home and the seizure of evidence from the home was authorized by the sister's valid consent to search, given verbally (and audiotaped by an officer) and in writing. The officers testified at trial that the sister was not coerced or threatened. Brown v. State, 288 Ga. 404, 703 S.E.2d 624 (2010).

Probable Cause

1. In General

Probably cause for search of auto stopped in roadway. — Trial court order suppressing drug evidence seized after a Terry stop of the defendant for parking in the middle of the road was error because O.C.G.A. § 40-6-200(a) made it improper to park in the middle of a two-way roadway, and provided a sound basis for the officer's decision to stop the defendant; as a result, the stop of the defendant was proper. Stafford v. State, 284 Ga. 773, 671 S.E.2d 484 (2008).

2. Affidavits

Affidavit based on information from ISP. — GBI agent was authorized to rely on information regarding sexually explicit images of children as reported by an internet service provider (ISP) pursuant to the ISP's statutory reporting obligation set forth in 42 U.S.C. § 13032(b)(1); the ISP's report was the equivalent of one made from a law-abiding concerned citizen, and therefore was afforded a preferred status insofar as testing the credibility of the information. Manzione v. State, 312 Ga. App. 638, 719 S.E.2d 533 (2011), cert. denied, No. S12C0485, 2012 Ga. LEXIS 308 (Ga. 2012).

Affidavit provided substantial probable cause basis.

Trial court did not err in denying the defendant's motion under O.C.G.A. § 17-5-30 to suppress evidence seized pursuant to search warrants because the applications for search warrants to search the defendant's apartment and the car for which registration information was given in the detective's affidavit contained sufficient information from which a judicial officer could determine there was a fair probability that evidence of a crime would be found at those sites as the sites were likely methods of transporting the victim and the likely destination of appellant and the victim; in the detective's affidavit, the detective related the discovery of the victim's body and the statements of the victim's friend and roommate concerning the victim's relationship with the defendant, and the victim's pregnancy and identification of the defendant as the father, who was not pleased about the pregnancy. Glenn v. State, 288 Ga. 462, 704 S.E.2d 794 (2010).

5. Probable Cause Found

Probable cause based on law enforcement affidavit. — Trial court properly denied defendant's motion to suppress evidence found during the execution of a search warrant as the appellate court found that, after reviewing all of the information in the affidavit as a whole, it provided sufficient probable cause for the magistrate to issue the search warrant and that the information provided was not stale. The warrant was executed the same day that it was issued and was supported by a law enforcement affidavit reciting a

stop made of defendant's vehicle for a failure to have tags and various drugs and drug-related items found in the vehicle that served as the basis for obtaining the search warrant for defendant's home. Cleveland v. State, 290 Ga. App. 835, 660 S.E.2d 777 (2008).

Probable cause found for administering alcohol test after valid vehicle stop. — Under the Fourth Amendment, an officer had probable cause to have a defendant submit to an alco-sensor test. The officer had validly stopped the defendant's car after a passenger littered, and the officer saw open beer bottles in the car and smelled alcohol in the car even after the bottles and the passenger had been removed. Hinton v. State, 289 Ga. App. 309, 656 S.E.2d 918 (2008).

Search warrant of defendant's car. — Magistrate had probable cause to issue a search warrant for a defendant's car the day after the victim was kidnapped and murdered; there was a fair probability that evidence of the crimes would be found in the car, which the defendant had parked in the victim's driveway. Dalton v. State, 282 Ga. 300, 647 S.E.2d 580 (2007).

Probable cause for arrest in hindering law enforcement. — When an initial stop was lawful and the defendant failed to stop when ordered to do so, there was probable cause to believe O.C.G.A. § 16-10-24(a) was violated and the defendant's apprehension and arrest did not violate the Fourth Amendment. United States v. Foskey, No. 10-15221, 2012 U.S. App. LEXIS 374 (11th Cir. Jan. 9, 2012), cert. denied, U.S. , 133 S. Ct. 460, 184 L. Ed. 2d 283 (2012) (Unpublished).

Reasonableness

Stop of juvenile was reasonable. — Juvenile court properly denied a juvenile's motion to suppress the physical and testimonial evidence as well as properly adjudicated the juvenile delinquent as a result of the evidence obtained by the police not being the product of an illegal detention. The officers who stopped the juvenile and three other cohorts had a reasonable suspicion, based on specific and articulable facts, that the juvenile should have been in school at the time and day of the stop, the juvenile matched the description of a youth involved in home burglaries with three others, and the four were stopped while canvassing the same neighborhood where a rash of burglaries had been occurring. In the Interest of J.T., 297 Ga. App. 636, 678 S.E.2d 111 (2009).

Searches

1. In General

Officer's discretion limited by language of warrant. — Language in search warrants authorizing a search for "any other item(s) that tend to lead to probable cause that a crime has been committed" did not cause the warrants to be general warrants prohibited by the Fourth Amendment because the language was preceded by a list of specific items which sufficiently limited the executing officers' discretion. Reaves v. State, 284 Ga. 181, 664 S.E.2d 211 (2008).

No standing to challenge search and seizure.

Defendant, who was a visitor at a motel room, had no expectation of privacy in the motel room and therefore lacked standing to challenge a search of the motel room in which defendant was found with crack cocaine. Smith v. State, 302 Ga. App. 128, 690 S.E.2d 449 (2010).

Abandoned property.

Duffle bag that a deputy sheriff found on the grass near a driveway of a house from which the defendant fled was abandoned property for purposes of the Fourth Amendment. Teal v. State, 282 Ga. 319, 647 S.E.2d 15 (2007).

Use of pre-Miranda statements to obtain search warrant. — Defendant did not show that warrants to search the defendant's home were invalid when the defendant's pre-Miranda statements were used to obtain the warrants because the defendant did not allege that the statements were involuntary, and physical evidence seized pursuant to a warrant obtained with a voluntary statement taken in violation of Miranda was admissible. Reaves v. State, 284 Ga. 181, 664 S.E.2d 211 (2008).

Search of vehicle passenger not the product of an illegally expanded traffic stop and did not exceed the scope of the consent given. — Trial court

properly denied defendant's motion to suppress the evidence of pills found on the defendant's person during a traffic stop and convicted the defendant of possession of dihydrocodeinone, since the pat down search of the defendant did not exceed the scope of the consent search and was authorized to ensure the officer's safety, and the safety of others, based on the vehicle driver identifying various weapons in the car. Further, the traffic stop was not illegally expanded since the defendant's arrest occurred nine minutes into the stop and the driver's radar check remained outstanding at the time. Stagg v. State, 297 Ga. App. 640, 678 S.E.2d 108 (2009).

Search of defendant's purse unauthorized. — Defendant was a visitor in a house in which narcotics were found in plain view by a law enforcement officer. Defendant was not suspected of any crime and consented to a search of defendant's locked vehicle. When the officer asked the defendant where the vehicle keys could be located, the defendant informed the officer where the defendant thought the keys might be. Defendant never specifically consented to a search of defendant's purse. Under these circumstances, the trial court was authorized to find that a typical reasonable person would not have understood the exchange between defendant and the officer to grant the officer permission to search the defendant's purse; therefore, defendant's motion to suppress narcotics found in the purse was properly granted. State v. Fulghum, 288 Ga. App. 746, 655 S.E.2d 321 (2007).

Officers had no knowledge of bond order when conducting search. — Defendant's drug-related convictions were reversed on appeal as the trial court erred by taking judicial notice of a bond order against the defendant to justify the search of the defendant's person by two officers on patrol in a high crime area when the officers had no knowledge of the bond order at the time the search was conducted. The trial court should have conducted a hearing to determine the validity of the defendant's waiver of the defendant's Fourth Amendment rights and the reasonableness of imposing such a waiver as a condition of the defendant's pretrial release on the bond. Cantrell v. State, 295 Ga. App. 634, 673 S.E.2d 32 (2009).

Search warrant supported by probable cause. — Search warrant was properly issued based on information from a caller to social services that methamphetamine was being made in the defendant's home in the presence of a six-year-old and on information from an officer that the defendant had been investigated for the drug, that the defendant had a reputation of dealing, using, and making the drug, and that numerous tips about the defendant's manufacturing the drug had been received. Moreover, the information was not stale as the information received from multiple sources indicated a long-term involvement in the manufacture of the drug and therefore a likelihood that the equipment for the drug's production would remain in place over time. Chambliss v. State, 298 Ga. App. 293, 679 S.E.2d 831 (2009).

2. Warrantless Searches

No probable cause for warrantless search of automobile. — Officer's warrantless search of defendant's vehicle following defendant's arrest for loitering was not a valid search incident to the arrest because defendant was not within reach of the defendant's vehicle at the time and there was no likelihood that there would be evidence of loitering in the vehicle. Nor was the search valid under the automobile exception because defendant's pulling on car door handles was insufficient probable cause for the officer to believe that there was evidence in the vehicle of thefts from other cars. Holsey v. State, 306 Ga. App. 75, 701 S.E.2d 538 (2010).

Warrantless entry into a home.

The state could not admit the marijuana discovered in the home of the defendants under either an exigent circumstance or inevitable discovery argument following the officers' warrantless entry into the home. Specifically, evidence of the marijuana on the table was the result of an illegal entry by the officers and, therefore, could not provide support for the search warrant and a police officer's lone statement that the officers smelled marijuana when the defendants opened the door was insufficient to establish probable cause for a search warrant of the defen-

dant's residence. State v. Pando, 284 Ga. App. 70, 643 S.E. 2d 342 (2007).

Contraband found by police officers in the defendant's hotel room was properly seized under the Fourth Amendment because the hotel manager had the authority to terminate the defendant's rental agreement without prior notice on the ground the defendant was selling drugs from the room and creating a disturbance at the hotel, and did so before the officers went to the room; thus, the defendant no longer had a reasonable expectation of privacy in the room. The officers had to determine if anyone was in the room before the clerk could lock the door and effectuate the eviction, and thus properly entered the room to search in places where someone could be hiding and properly seized marijuana found on a table in plain view, as well as marijuana located under the bed. Johnson v. State, 285 Ga. 571, 679 S.E.2d 340 (2009).

Marijuana was properly seized from the pocket of a coat hanging outside the bathroom door in the defendant's hotel room; the officer who needed to enter the closed bathroom was justifiably concerned for safety and was worried if a bulge in the coat was a gun. A pat-down of the coat pocket was a reasonable step, and the officer was authorized to seize a baggie found in the pocket. Johnson v. State, 285 Ga. 571, 679 S.E.2d 340 (2009).

Trial court erred by basing the court's decision to grant a motion to suppress solely on a dislike of police officers' "knock and talk" procedures and in concluding that the officers did not have the right to use such procedures; although the trial court forcefully expressed the court's disdain for knock-and-talk procedures, such measures were unquestionably constitutional. State v. Able, 321 Ga. App. 632, 742 S.E.2d 149 (2013).

Looking under couch cushions during warrantless search justified. — It was reasonable under U.S. Const., amend. IV for a police officer to lift the cushions of a couch where the defendant juvenile had been laying when the police entered the defendant's house during an investigation of an armed robbery and related offenses as the circumstances of the criminal conduct involved a weapon and violence, and the police were acting reasonably by searching the area immediately around the defendant for weapons; the cash that was seized from under the couch cushions accordingly did not need to be suppressed. Gray v. State, 296 Ga. App. 878, 676 S.E.2d 36 (2009), cert. dismissed, No. S09C1309, 2009 Ga. LEXIS 802 (Ga. 2009).

Cell phones are electronic containers. — For purposes of a search incident to arrest, a cell phone may be treated in the same manner as a traditional physical container. The potential volume of information contained in a cell phone does not change the cell phone's character; a cell phone is an object that can store considerable evidence of the crime for which the suspect has been arrested, and that evidence may be transitory in nature. The mere fact that there is a potentially high volume of information stored in the cell phone should not control the question of whether that electronic container may be searched. Hawkins v. State, 290 Ga. 785, 723 S.E.2d 924 (2012).

Search of a cell phone incident to arrest must be limited as much as is reasonably practicable by the object of the search. That will usually mean that an officer may not conduct a fishing expedition and sift through all of the data stored in the cell phone. Thus, when the object of the search is to discover certain text messages, for instance, there is no need for the officer to sift through photos or audio files or Internet browsing history data stored in the phone. Hawkins v. State, 290 Ga. 785, 723 S.E.2d 924 (2012).

3. Voluntariness

Consent of probationer to search. — When officers went to a defendant's residence to conduct a probation search based on a tip that the defendant was involved with drugs, as the defendant willingly led them to a concealed gun, and voluntarily furnished a urine sample that tested positive for methamphetamine, the defendant gave valid consent to the search, which eliminated the need for either probable cause or a search warrant under U.S. Const., amend. IV. Brooks v. State, 285 Ga. 424, 677 S.E.2d 68 (2009).

Consent of probationer to waiver of rights. — Trial court did not err in denying the defendant's motion to suppress the results of a search of the defendant's person and home because the defendant validly waived the defendant's Fourth Amendment rights under the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. XIII, when the defendant entered into a negotiated guilty plea to possession of a firearm and possession of marijuana; the transcripts of the defendant's guilty plea revealed that the defendant was informed by the assistant district attorney that a Fourth Amendment waiver was part of the negotiation, neither the defendant nor the attorney objected to the Fourth Amendment waiver during the plea, the trial court explained the Fourth Amendment waiver to the defendant on the record, and the defendant signed a waiver as a special condition of probation. Morrow v. State, 311 Ga. App. 323, 715 S.E.2d 744 (2011), cert. denied, No. S11C1872, 2011 Ga. LEXIS 993 (Ga. 2011).

Consent of housing authority director invalid. — City housing authority director's consent to the search of a housing unit was not valid; therefore, an officer's warrantless entry into the premises and seizure of marijuana therein was also invalid. The state failed to show that the terms of the housing unit lease authorized the director to enter the premises under certain circumstances. Bowden v. State, 304 Ga. App. 896, 698 S.E.2d 372 (2010).

4. Vehicles

Totality of circumstances.

A violation of O.C.G.A. § 40-5-33 did not justify defendant's continued detention by the police and the officer's decision to detain the defendant while the officer waited for another officer to bring a written warning book was unreasonable; thus, under the totality of the circumstances, the officer did not have specific, articulable facts that could constitute a particularized and objective basis for suspecting that the defendant was involved in any criminal activity thereby making the search unreasonable under the Fourth Amendment and requiring suppression of the evidence seized from the vehicle. Bennett v. State, 285 Ga. App. 796, 648 S.E.2d 126 (2007).

Impoundment of vehicle.

It was reasonable under the Fourth Amendment for police to impound the victim's truck in order to prevent tampering before they obtained the search warrant pursuant to which the truck was later searched; the truck's owner was a murder victim, the most recent user was the prime suspect and was still at large, and the truck was not secure. Teal v. State, 282 Ga. 319, 647 S.E.2d 15 (2007).

Search incident to arrest.

Trial court did not err in denying the defendant's motion to suppress as the officers could lawfully search the interior of the defendant's car. A sergeant who had received a report of a speeding car had a reasonable and articulable suspicion of criminal activity having occurred, and after the defendant fled and disobeyed an order to stop, a second officer had probable cause to arrest the defendant for obstruction following which the car interior could be lawfully searched under O.C.G.A. § 17-5-1. Spence v. State, 295 Ga. App. 583, 672 S.E.2d 538 (2009).

Consented search.

A trial court did not err in denying either defendant's motion to suppress the methamphetamine seized during the consensual search of defendant's vehicle or a motion to suppress defendant's voluntary custodial statement as the testimony of the arresting and investigating officers established that defendant did not display any problems with the understanding of the English language as did videotapes of the vehicle search and the in custody interview, which likewise showed defendant having no problems with the English language. Therefore, defendant's consent to the search of the vehicle nor defendant's waiver of defendant's Miranda rights were invalidated. Serrano v. State, 291 Ga. App. 500, 662 S.E.2d 280 (2008).

Suppression motion filed by a defendant was properly denied because a state trooper who initiated a traffic stop obtained the defendant's consent to search the defendant's vehicle, whereupon drugs were found, virtually contemporaneously with the issuance of a warning ticket; there was no prolonged detention in vio-

lation of the Fourth Amendment. Hayes v. State, 292 Ga. App. 724, 665 S.E.2d 422 (2008).

Trial court did not err in denying the defendant's motion to suppress the cocaine that was discovered during a search of the rental vehicle the defendant was driving based on evidence from the officer that the defendant consented to the search, although the defendant testified that the defendant did not consent and that the officer just announced that the officer was going to search. Morgan v. State, 311 Ga. App. 740, 716 S.E.2d 821 (2011).

Search of backpack in automobile for contraband. — Driver consented to a full-blown search, which included closed packages and containers, and the officer explicitly inquired about the presence of drugs. Therefore, oxycodone found in a closed book bag in the back seat was not subject to a motion to suppress by a front-seat passenger, despite the defendant's claimed expectation of privacy in the book bag. Varriano v. State, 312 Ga. App. 266, 718 S.E.2d 14 (2011), cert. denied, 2012 Ga. LEXIS 250 (Ga. 2012).

Scope of search of lawfully stopped vehicle after smelling marijuana. — A trial court properly denied a defendant's motion to suppress the evidence of drugs and a handgun found during the warrantless search of the defendant's vehicle as the arrest of the defendant's passenger on an outstanding warrant authorized the stop of the defendant's vehicle and the mobility of the car, coupled with the existence of probable cause to believe the car contained marijuana, based on the officer smelling the marijuana upon approaching the vehicle, authorized the search. Somesso v. State, 288 Ga. App. 291, 653 S.E.2d 855 (2007), cert. denied, 2008 Ga. LEXIS 281 (Ga. 2008).

Request for consent to search a vehicle after telling defendant that defendant was free to go. — State trooper's request to search a defendant's vehicle after telling the defendant that defendant was free to go did not unreasonably prolong the detention and did not violate the defendant's Fourth Amendment rights. Therefore, the four pounds of marijuana found during the search was not subject to suppression. Davis v. State, 303 Ga. App. 785, 694 S.E.2d 696 (2010).

Search of prison employee's vehicle.

Trial court properly denied a motion to suppress filed by the defendant, a corrections officer, whose car was searched after a drug-detecting dog alerted in the parking lot of the prison where the defendant worked. Signs posted outside the prison informed those entering that they would be subject to search once inside the guard line; by driving onto the premises, the defendant consented to such a search. Bradley v. State, 292 Ga. App. 737, 665 S.E.2d 428 (2008).

Search of motor vehicle improper.

A trial court properly granted a defendant's motion to suppress a firearm — a hunting rifle that was in the cab of the defendant's pick-up truck — that was seized from the vehicle after a traffic stop, because no evidence was presented of any danger to justify the warrantless search of the vehicle for weapons, and the officer acknowledged the search was conducted merely to see if the firearm was stolen, with no basis shown that criminal activity existed. State v. Jones, 289 Ga. App. 176, 657 S.E.2d 253 (2008).

Trial court erred by denying two defendants' motion to suppress the drug evidence found in the vehicle in which one defendant was driving, and the other defendant was a passenger, because the search of the vehicle was conducted after the defendants were illegally detained after a traffic stop. The officers were justified in stopping the vehicle upon observing the vehicle speeding but by only observing nervousness and an expandable baton, the officers exceeded the scope of a permissible search by continuing to detain the defendants without any cause to believe the defendants were dangerous; thus, the search was not justified. Bell v. State, 295 Ga. App. 607, 672 S.E.2d 675 (2009).

No prolonged detention by drug dog sniff. — Denial of a defendant's motion to suppress evidence of contraband found during a search of the defendant's vehicle was proper where there was no prolonged detention in violation of the Fourth Amendment by a deputy's re-

trieval of a drug detection dog from the deputy's cruiser and use of the dog for a drug sniff around the vehicle; the dog sniff did not cause more than minimal delay. Wilson v. State, 293 Ga. App. 136, 666 S.E.2d 573 (2008).

Eight minute delay while waiting on license verification not unreasonable. — Officer did not prolong a traffic stop unreasonably to search a vehicle in which a defendant was a passenger pursuant to the driver's consent. The eight minutes between the beginning of the traffic stop and the time the officer requested the search was not inherently unreasonable, and the officer was waiting to receive verification of the driver's license. Hall v. State, 306 Ga. App. 484, 702 S.E.2d 483 (2010).

Seizures

Approaching defendant and asking for consent to search. — Defendant did not contradict a police officer's testimony that the officer and the officer's partner stopped their car, approached the defendant and another person, and asked for consent to search them. Thus, the contact between police and the defendant before the discovery of marijuana was a consensual encounter that involved no coercion or detention and did not have to be supported by reasonable suspicion under the Fourth Amendment. In the Interest of D. H., 285 Ga. 51, 673 S.E.2d 191 (2009).

Unspecified notes and papers. — Authorization in four warrants for the seizure of unspecified notes and papers and for the seizure of "any other evidence" of the crimes named in the warrants complied with the Fourth Amendment's mandate that items to be seized through a warrant must be described with particularity. Reaves v. State, 284 Ga. 236, 664 S.E.2d 207 (2008).

Arrests

1. In General

Claims relating to excessive force

Evidence that an arrestee had stopped the car in compliance with an officer's instructions during a traffic stop for speeding and that the arrestee was then shot in the face by the officer did not entitle the officer to qualified immunity from liability for using excessive force in violation of the Fourth Amendment. Therefore, the trial court erred in granting summary judgment to the officer. Porter v. Massarelli, 303 Ga. App. 91, 692 S.E.2d 722 (2010).

2. Warrantless Arrest

Facts sufficient to support probable cause for arrest. — Probable cause authorized defendant's arrest for criminal attempt to manufacture methamphetamine, despite no illegal drugs being found on defendant, based on the similarities between the descriptions broadcasted in a be-on-the-look-out dispatch matched defendant's truck and passengers, the items found in the truck coincided with the manufacturing, and the opinion of one of the arresting officers, who had experience as a narcotics agent. Kohlmeier v. State, 289 Ga. App. 709, 658 S.E.2d 261 (2008).

Excessive force not found in arrest of restaurant invitee without warrant. — Trial court properly granted summary judgment to a police officer and a city on a 42 U.S.C.S. § 1983 claim brought by a restaurant invitee who was arrested following an altercation at the restaurant. Although the invitee claimed that the officer used excessive force by handcuffing the invitee too tightly in violation of the Fourth Amendment, the invitee never complained or showed signs that the handcuffs were causing pain or injury; thus, it was reasonable for the officer to complete the short drive to the detention facility and then remove the handcuffs, and there was no Fourth Amendment violation. Kline v. KDB, Inc., 295 Ga. App. 789, 673 S.E.2d 516 (2009).

Warrants

3. Particularity of Description

Illegal, warrantless entry into motel room tainted subsequent consent. — Trial court erred by denying defendant's motion to suppress drug evidence found in a motel room that defendant was occupying with another as the warrantless entry into the hotel room by the police violated the Fourth Amendment and the

illegal entry tainted defendant's consent to search and rendered the consent invalid. The state also failed to carry the state's burden to show that a third party's subsequent consent to search the room was untainted by the illegal entry. Snider v. State, 292 Ga. App. 180, 663 S.E.2d 805 (2008).

Investigative Stops

1. In General

Reasonableness of suspicion of criminal activity.

Officer had reasonable suspicion to stop a defendant in a parking lot at 3:00 a.m. because the defendant matched the description of a man seen hiding behind the restaurant dumpster, prompting restaurant employees to call police. The defendant's subsequent consent to a search of the defendant's person was valid. Johnson v. State, 313 Ga. App. 137, 720 S.E.2d 654 (2011).

Justification of officer's restraining individual's freedom.

There was no violation of a defendant juvenile's rights under U.S. Const., amend. IV by the officers' conduct in handcuffing the defendant upon entering the defendant's house during an investigation of an armed robbery of a house next door as the handcuffing was done as part of an investigatory detention for purposes of the officers' safety while a weapon search was undertaken; the circumstances of the armed robbery were extremely violent, and the officers had followed tracks in the grass from the victim's home to the defendant's home, such that the means of detention employed by the officers was reasonable in the circumstances. Gray v. State, 296 Ga. App. 878, 676 S.E.2d 36 (2009), cert. dismissed, No. S09C1309, 2009 Ga. LEXIS 802 (Ga. 2009).

Investigative stop of defendant walking down street in domestic dispute investigation. — When the defendant, who told an officer that the defendant was walking to another location at 4:00 A.M. because the defendant was "mad with" the defendant's lover, fled upon hearing an officer mention the name of the defendant's street in a dispatch call, this justified a brief investigatory stop under the Fourth Amendment, authorizing the officer to chase and briefly detain the defendant in order to complete an investigation into a suspected domestic dispute. McClary v. State, 292 Ga. App. 184, 663 S.E.2d 809 (2008).

2. Vehicle Stops

When stop authorized.

An officer in an unmarked car who had been following the defendant based on a tip that the defendant was transporting methamphetamine was authorized to stop the defendant under the Fourth Amendment and the Georgia Constitution after the officer saw the defendant illegally cross the center line. Sapp v. State, 297 Ga. App. 218, 676 S.E.2d 867 (2009).

Stop held invalid.

When the only evidence to support a traffic stop was that defendant's car was in front of a residence that had been previously raided by the police, this did not constitute an objective manifestation that defendant was, or was about to be, engaged in criminal activity sufficient to warrant the intrusion of a traffic stop. Pritchard v. State, 300 Ga. App. 14, 684 S.E.2d 88 (2009).

Oxycodone found in the glove box of a car was inadmissible because the oxycodone was discovered pursuant to a consent search that was the product of an unauthorized traffic stop. The officer had no reasonable suspicion to justify stopping the defendants other than that the defendants' car was "out of place" at an empty truck stop parking lot. Groves v. State, 306 Ga. App. 779, 703 S.E.2d 371 (2010).

Stop based on obstructed license plate proper.

Although defendant's car had license plates from South Carolina, a state trooper was still justified in making a stop of defendant's car because the visibility and display portions of O.C.G.A. § 40-2-41 were applicable to all vehicles, and defendant's license plate had a bracket around it that blocked view of the registration expiration date. Furthermore, detention of defendant following the stop was justified as the trooper had a reasonable suspicion of other criminal activity due to defendant's nervousness, the conflicting version of events between de-

fendant and defendant's passenger, and the overly strong smell of air freshener emanating from the car; the traffic stop was not unreasonably prolonged, and the officer's questioning did not violate U.S. Const., amend. IV. Wilson v. State, 306 Ga. App. 286, 702 S.E.2d 2 (2010).

Stop of vehicle that fit description of vehicle used in recent robbery.

Officers had the requisite articulable suspicion to stop a Camry shortly after it was seen running a stop sign and speeding away from an abandoned getaway car, left with its engine running and doors open, not far from the site of an armed robbery of a jewelry store. Additionally, the officer's description of the Camry included the fact that it had shiny wheels, which the stopped Camry also had. Harper v. State, 300 Ga. App. 757, 686 S.E.2d 375 (2009).

Duration of stop as affecting reasonableness.

When an officer who had initially detained the defendant because of suspected seat belt and tag violations and who smelled marijuana in the defendant's car asked questions related to the marijuana, checked whether the defendant had a valid license, and then asked the defendant to consent to a search while completing a warning citation for the seat belt and tag violations, the defendant did not show that the detention was prolonged so as to become unreasonable merely because, during the course of this lawful investigation, the officer asked the defendant several unrelated questions. Macias v. State, 292 Ga. App. 225, 664 S.E.2d 265 (2008), cert. denied, 2008 Ga. LEXIS 881 (Ga. 2008).

Scope and duration of stop not impermissibly expanded.

After stopping the defendant and asking for the defendant's name and driver's license, an officer asked if the defendant had anything illegal on the defendant's person or in the defendant's truck, and the defendant responded that there was an illegal substance in the truck and then consented to a search. Thus, the trial court was authorized to find that the officers diligently and swiftly confirmed their suspicions and that the detention and questioning of the defendant were not unreasonably lengthy. Furthermore, while the officers were questioning the defendant, one officer saw a drug pipe in plain view on a seat, which gave the officers probable cause to arrest the defendant, search the truck, and seize the items found inside the truck. Sapp v. State, 297 Ga. App. 218, 676 S.E.2d 867 (2009).

Roadblocks used to identify licenses, insurance, and sobriety. — When the defendant was convicted of less-safe DUI under O.C.G.A. § 40-6-391, the trial court did not err in denying the defendant's motion to suppress the results of breath and blood tests because the daylight roadblock was well-identified as a police checkpoint for the stated and authorized purpose of checking driver's licenses, insurance, and driver sobriety. The court of appeals found no authority for the proposition that the Fourth Amendment required that roadblocks be identified with orange cones or that officers working there wear reflective hats. Clark v. State, 318 Ga. App. 873, 734 S.E.2d 839 (2012).

Use of a trained drug detection dog.

Even though a defendant refused to consent to a search of the defendant's car, because the defendant was validly detained for less than ten minutes while an officer checked the defendant's license, a sergeant's use of a drug dog to walk around the defendant's car was not an unreasonable search and did not require a reasonable suspicion. Becoats v. State, 301 Ga. App. 768, 688 S.E.2d 686 (2009), cert. denied, No. S10C0805, 2010 Ga. LEXIS 434 (Ga. 2010).

Pat-down of operator justified.

A trial court properly denied the defendant's motion to suppress the contraband found on the defendant's person as a result of a traffic stop that came to fruition after an officer observed the defendant making a U-turn in front of a recently robbed bank because the defendant admitted to having a knife in the defendant's pocket but refused to remove the defendant's hand therefrom. As a result, the police were justified in frisking the defendant for safety reasons and the contraband was, therefore, legally obtained from the defendant. Johnson v. State, 289 Ga. App. 27, 656 S.E.2d 161 (2007).

Roadblocks.

Stop of the defendant's vehicle was not consensual since the state trooper positioned the trooper's patrol car to prevent any vehicle from leaving the parking lot and there was no evidence that the trooper reasonably suspected that the defendant was committing a crime; without evidence that the defendant was trying to avoid the roadblock, the trooper lacked reasonable suspicion to stop the defendant. Jones v. State, 291 Ga. 35, 727 S.E.2d 456 (2012).

Roadblock purpose was proper.

When an officer's trial testimony was taken as a whole, the trial court properly found that the primary purpose of a roadblock was related to roadway safety and checking for things such as licenses, insurance, tags, and seat belt violations; the record indicated that the officer was concerned with crime suppression only in the sense that the officer believed that conducting a roadblock would raise the profile of police in the particular area. Thus, the roadblock did not violate the Fourth Amendment. Sutton v. State, 297 Ga. App. 865, 678 S.E.2d 564 (2009).

Alleged avoidance of roadblock.

Officer had the authority to approach a driver exiting a stopped vehicle and ask for the driver's license after the driver turned off the road into a gas station prior to encountering a roadblock. Once the officer smelled alcohol on the driver's breath, the officer was authorized to detain the driver further. Therefore, the driver's motion to suppress evidence from the stop was properly denied. Bacallao v. State, 307 Ga. App. 539, 705 S.E.2d 307 (2011).

Investigatory stop authorized.

In a driving under the influence case, there was no merit to the defendant's argument that an officer lacked articulable suspicion to stop the defendant's vehicle. Testimony that the defendant was swerving showed that the defendant was not stopped because of mere inclination, caprice, or harassment, and the trial court accepted the officer's testimony that the full extent of the defendant's actions was not reflected on a video shown to the jury. Hann v. State, 292 Ga. App. 719, 665 S.E.2d 731 (2008).

An officer had reasonable suspicion to stop the defendant's vehicle, which matched the description of one the officer had been told to be on the lookout for, as it was connected with previous suspicious activity and with a suspect who was wanted by police, and it was described with great particularity. Furthermore, as the officer was justified in detaining the defendant long enough to determine whether an outstanding warrant was valid, the extent of the stop did not exceed the permissible scope of the investigation; having already effected a valid stop, the officer could request consent to search the vehicle. Edmond v. State, 297 Ga. App. 238, 676 S.E.2d 877 (2009).

There was reasonable suspicion to stop the defendant's vehicle. The defendant was the only person who had been in physical contact with a drug dealer whom police were watching; the defendant took a package from the dealer; and a search of the dealer's car indicated that the dealer no longer had the drugs, giving rise to a reasonable suspicion that the defendant did. Garza v. State, 298 Ga. App. 332, 680 S.E.2d 175 (2009).

Officer's waving a car to a stop was not a Terry stop requiring reasonable suspicion. — Trial court did not err in denying a DUI defendant's motion to suppress evidence seized after the defendant was waved to a stop by a police officer because the encounter was a first-tier encounter not requiring a reasonable suspicion. The defendant was free to leave at any time during the encounter, and the defendant agreed to accompany the officer back to a house the defendant had just left. Butler v. State, 303 Ga. App. 564, 694 S.E.2d 168 (2010).

On facts, articulable ground for suspicion existed.

Denial of a defendant's motion to suppress physical and testimonial evidence that arose from a stop of a vehicle that the defendant was riding in as a passenger was proper and not violative of U.S. Const., amend. IV because the police had a reasonable articulable suspicion to make the stop upon seeing the vehicle near the vicinity of a burglary; the vehicle was driving on a road that led to a closed business, the defendant and the vehicle

driver appeared startled to see the police at the apartment that had been burglarized, and there were no other vehicles in the vicinity at the time. Taylor v. State, 296 Ga. App. 481, 675 S.E.2d 504 (2009).

Stop held valid.

Because an officer was authorized to stop vehicles for traffic violations under both the Fourth Amendment and the Georgia Constitution, it was proper for the officer to stop the defendant, whose vehicle bore the license plate of another vehicle in violation of O.C.G.A. § 40-2-6. Thompson v. State, 289 Ga. App. 661, 658 S.E.2d 122 (2007).

Trial court properly denied defendant's motion to suppress drug evidence because the stop of defendant's vehicle was justified based on the police having observed defendant at a residence under surveillance for suspected drug activity: (1) defendant went in and out of the residence under surveillance in under five minutes; (2) defendant had a drug seller as a passenger in defendant's vehicle; and (3) defendant drove to the passenger's residence. The stop was a second-tier encounter that required reasonable suspicion, and the collective knowledge of the officers involved, based on the officers' observations, justified defendant's stop. Satterfield v. State, 289 Ga. App. 886, 658 S.E.2d 379 (2008).

Improper expansion of scope of traffic investigation.

Police officers impermissibly expanded the traffic stop without reasonable, articulable suspicion, resulting in an illegal detention of both the driver of the vehicle and the passenger and the defendant's consent to search the vehicle was the product of this illegal detention; thus, the evidence obtained as a result of the illegal search was rightfully suppressed. Specifically, the police officer requested permission to search the car "before you guys take off" after returning defendant's license and giving a warning, but while continuing to detain and question the defendants; thus, it was doubtful that any reasonable person in these circumstances would have felt free to disregard the police officer and go. State v. Conner, 288 Ga. App. 517, 654 S.E.2d 461 (2007).

Stop for playing loud music. — In a case in which the defendant appealed a conviction for violating 18 U.S.C. § 922(g)(1), the defendant unsuccessfully argued that the district court erred in denying the defendant's motion to suppress the evidence seized from the defendant's automobile after being stopped by a police officer for violating O.C.G.A. § 40-6-14(a). The officer testified at the suppression hearing that the officer heard a loud thumping sound coming from the radio in defendant's automobile when the officer was located one block away from the defendant and that the officer heard the automobile before seeing the automobile; a reasonable officer in the officer's position could have believed that the music was audible more than one-hundred feet away on the basis of those observations, and any mistake of fact by the officer in evaluating the distance from the defendant's car was a reasonable one, and the officer did not violate the Fourth Amendment by stopping the defendant for violation of the noise statute. United States v. Smalls, No. 11-12621, 2012 U.S. App. LEXIS 1203 (11th Cir. Jan. 19, 2012) (Unpublished.)

Search and Seizure Incident to Lawful Arrest

Lawful arrest authorizes searches.

Evidence that the defendant stalked and threatened to kill the victim on numerous occasions, and that, shortly before the victim was fatally stabbed, the defendant was seen in the victim's front yard, gave police probable cause to arrest the defendant. Therefore, seizure of the boots the defendant was wearing at the time of the arrest did not violate the Fourth Amendment and the impressions the officers made at the crime scene were properly admitted into evidence. Smith v. State, 284 Ga. 304, 667 S.E.2d 65 (2008).

Search of an automobile incident to lawful arrest, etc.

Even if the police search of a vehicle following a defendant's arrest after a high speed chase was improper because there was no reason to suspect there would be evidence of a traffic violation in the vehicle, the evidence would have been discovered during an inventory search after the impoundment of the vehicle, which was lawful because all the tires were damaged.

Humphreys v. State, 287 Ga. 63, 694 S.E.2d 316, cert. denied, 131 S. Ct. 599, 178 L. Ed. 2d 438 (2010).

State failed to prove that the state's search of a vehicle's center console after the arrest and handcuffing of the car's occupant was proper because the state failed to establish the defendant's location in relation to the vehicle, when the defendant was already in handcuffs, at the time of the search or to otherwise show that the console was within the defendant's arm's reach. Boykins v. State, 290 Ga. 71, 717 S.E.2d 474 (2011).

Trial court correctly concluded that the arresting officer had probable cause to search the defendant's vehicle based on smelling marijuana, and that the search inevitably would have led to the discovery of the contraband in the defendant's purse. Accordingly, the trial court did not err in denying the defendant's motion to suppress or for a new trial. Foster v. State, 321 Ga. App. 118, 741 S.E.2d 240 (2013).

Consent Searches

1. In General

Consent cannot be product of illegal detention.

Trial court did not impose an unjustifiably lengthy sentence merely because a defendant chose to require the prosecution to prove the defendant's guilt at trial rather than to enter a plea of guilty because the trial court sentenced defendant to the maximum term of 20 years in prison for kidnapping and on each of the aggravated assault counts, the trial court also exercised the court's discretion to run all of the counts concurrently instead of consecutively; the defendant's claim that the trial court punished the defendant for exercising the defendant's right to a jury trial was not supported by the transcript, which revealed that the sentence imposed by the trial court was based on the defendant's lack of remorse. Walker v. State, 299 Ga. App. 788, 683 S.E.2d 867 (2009).

Withdrawal of consent not shown. — An investigator's testimony that the defendant "got kind of upset a little bit" upon being questioned regarding the things which had been found at the defendant's trailer did not demonstrate that the defendant withdrew consent to a search. Boone v. State, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

Reasonable suspicion not required for police to ask for consent to search from passenger who was not detained and had voluntarily driven vehicle to police station following arrest. — Trial court erred in granting a motion to suppress on the grounds that there was no reasonable suspicion to search a vehicle. Reasonable suspicion was not required in order for police to ask for consent to search from a passenger, who was not detained, who had voluntarily driven the vehicle to the police station following the driver's arrest; however, there were factual questions regarding the voluntariness of the consent that the trial court was required to resolve. State v. Hogans, 301 Ga. App. 261, 687 S.E.2d 230 (2009).

Consent to search.

Trial court did not err in failing to grant the defendant's motion to suppress a pistol because the search of a residence was properly conducted when the police obtained the consent of the homeowner; the defendant, who was a visitor at the residence, was physically present but failed to express any refusal of consent or any objection to a police search. Rockholt v. State, 291 Ga. 85, 727 S.E.2d 492 (2012).

2. Who May Consent

Consent by roommate did not authorize search. — Defendant was entitled to suppression of a gun, money, and drugs seized from the defendant's residence because the search was unreasonable under the Fourth Amendment as the defendant was not informed when the police came to the residence and arrested the defendant on an outstanding warrant that the defendant's roommate had consented to the search of the residence; the defendant could have erroneously believed that the search was incident to the arrest on a driving violation. Preston v. State, 296 Ga. App. 655, 675 S.E.2d 553 (2009).

3. Voluntariness

Proof of voluntary consent.

Trial court properly denied a defen-

dant's motion to suppress two videotapes seized from the defendant's residence that displayed the defendant engaging in sexual acts with two minors because the defendant had consented to the deputies playing the first videotape, thereby obviating the need for a search warrant, and a third party had spontaneously and voluntarily handed the videotape to the deputies. Mitchell v. State, 289 Ga. App. 55, 656 S.E.2d 145 (2007), cert. dismissed, No. S08C0770, 2008 Ga. LEXIS 499 (Ga. 2008).

As the evidence supported a finding that the defendant freely and voluntarily consented to a special condition in a bond, allowing a warrantless search of the defendant's residence, denial of suppression with respect to drugs and a handgun seized during the search was proper as was the finding that the defendant had waived rights under U.S. Const., amend. IV; the special condition form was considered along with the bond order as the documents had been executed contemporaneously pursuant to former O.C.G.A. § 24-6-3(a) (see O.C.G.A. § 24-3-3). Curry v. State, 309 Ga. App. 338, 711 S.E.2d 314 (2011).

Voluntary consent by probationer to searches.

When officers went to the defendant's residence to conduct a probation search based on a tip that the defendant was involved with drugs, as the defendant willingly led them to a concealed gun, and voluntarily furnished a urine sample that tested positive for methamphetamine, the defendant gave valid consent to the search, which eliminated the need for either probable cause or a search warrant under U.S. Const., amend. IV. Brooks v. State, 285 Ga. 424, 677 S.E.2d 68 (2009).

The trial court did not err, etc.

Trial court properly found that a defendant's consent to the search of the defendant's car was voluntary. The defendant chose to pull over into the parking lot of the restaurant the defendant owned, and the defendant showed no authority for the proposition that the presence of customers in the area invalidated the consent; furthermore, the defendant had not shown that the consent was procured by threats, promises, or coercion. Macias v. State, 292 Ga. App. 225, 664 S.E.2d 265 (2008), cert. denied, 2008 Ga. LEXIS 881 (Ga. 2008).

Signing of waiver form. — When a defendant signed a consent form authorizing the search of the defendant's apartment and did not contest the voluntariness of this consent in the trial court, this obviated the need for a search warrant. Judkins v. State, 282 Ga. 580, 652 S.E.2d 537 (2007).

Voluntary consent held shown.

There was no violation of the defendant juvenile's rights under U.S. Const., amend. IV by the consent of the defendant's mother to police officers to search the house as the consent was voluntary and was not the product of coercion, duress, or deceit under the circumstances. Gray v. State, 296 Ga. App. 878, 676 S.E.2d 36 (2009), cert. dismissed, No. S09C1309, 2009 Ga. LEXIS 802 (Ga. 2009).

Trial court's determination that the defendant voluntarily consented to searches of the defendant's person was supported by the evidence because the investigator who obtained the consents testified that no threats or promises were made to the defendant, that the defendant had no questions regarding the forms and never indicated a reluctance to sign them, and that at the time that the defendant signed the forms, the defendant was not under arrest and was free to leave; the investigator also testified that the defendant did not appear to be under the influence of alcohol or drugs or to be overly tired, and the defendant did not allege that his age or level of intelligence rendered his consent involuntary. Arrington v. State, 286 Ga. 335, 687 S.E.2d 438 (2009), cert. denied, 131 S. Ct. 112, 178 L. Ed. 2d 69 (U.S. 2010).

Police officer did not coerce a juvenile's consent to search a cigarette package during a traffic stop for running a stop sign, despite the presence of several officers and the juvenile's age, which was 16 years old. The officer was not required to inform the juvenile that the juvenile did not have to consent. In re A. T., 302 Ga. App. 713, 691 S.E.2d 642 (2010).

Voluntary consent held not shown.

Trial court erred by denying defendants' motion to suppress drug and weapon evi-

dence found in defendants' vehicle during a search after a routine traffic stop as the driver's consent to search was coerced in violation of defendants' Fourth Amendment rights by an officer's intimidating, harassing, and threatening words of arrest used to convince the driver to consent. A videotape of the stop showed that the officer threatened the driver with obstruction of justice and that the officer would bring a dog to the scene if the driver did not consent to the search. Cuaresma v. State, 292 Ga. App. 43, 663 S.E.2d 396 (2008).

Plain View

Elements of plain view doctrine. Trial court's enunciated standard for applying the plain view exception to documents seized during the execution of a search warrant, whether the police reasonably could have believed that the documents would aid in the prosecution of the crime under investigation, was more lenient than the proper standard; the proper standard was whether the documents' evidentiary value was immediately apparent upon a mere glance or cursory inspection. The portion of the trial court's order finding "the notebook paper" and "the e-mail" admissible was therefore improper, and a remand for a new finding rendered pursuant to the proper standard was required. Reaves v. State, 284 Ga. 236, 664 S.E.2d 207 (2008).

Holder in plain view. — Counsel was not ineffective for failing to file a motion to suppress a holster when the admission of the holster did not violate the Fourth Amendment. The information in an affidavit contained sufficient information for the magistrate to come to the commonsense conclusion that evidence of contraband could be found at the defendant's apartment, and an officer saw the holster in plain view in an area in which the officer had a right to be while searching for contraband. Cobb v. State, 283 Ga. 388, 658 S.E.2d 750 (2008).

Photographs of items in plain view. — Juvenile court did not err by admitting photographs of a parent's home during deprivation proceedings because pretermitting whether a purported violation of the Fourth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XIII would preclude the admission of photographs in a child deprivation action, police officers were authorized to take photographs of items observed in plain view as long as the officer was in a place where he or she was entitled to be; even assuming that the admission of the photographs was erroneous, the parent failed to show that the parent was harmed thereby in light of the remaining evidence supporting the juvenile court's determination that the children were deprived. In the Interest of R. C. H., 307 Ga. App. 774, 706 S.E.2d 686 (2011).

Fingerprints, Blood, Urine and other Medical Tests

Drug and alcohol testing in DUI case. — Because a defendant was arrested for driving under the influence under O.C.G.A. § 40-6-391 based on probable cause and the state had complied with the implied consent requirements of O.C.G.A. § 40-5-55, the defendant could not complain that drug and alcohol testing violated the search and seizure provisions of the Fourth Amendment or the Georgia Constitution because the implied consent statute allowed for the warrantless compelled testing of bodily fluids based on the existence of probable cause, but without proof of the existence of exigent circumstances. Cornwell v. State, 283 Ga. 247, 657 S.E.2d 195 (2008).

DNA samples. — Defendant's DNA sample was not obtained in violation of the Fourth Amendment because a detective informed the defendant that the sample would be used for comparison with other such samples and no limits were placed on the scope of the defendant's consent. Holmes v. State, 284 Ga. 330, 667 S.E.2d 71 (2008).

Petitioner was not entitled to habeas relief because it was clear from the record that the petitioner was afforded an opportunity to develop the petitioner's Fourth Amendment claim in the trial court, as well as on appeal; the fact that the petitioner disagreed with the state court's conclusions of state law with respect to the defendant's status at the time of the DNA distraction did not demonstrate that the defendant did not receive a full and

fair opportunity to litigate the defendant's Fourth Amendment claim, and there was nothing clearly erroneous about the state court's factual findings that the petitioner was not a probationer at the time of the DNA extraction and that the saliva sample was taken upon petitioner being physically discharged from lawful custody. Leftwich v. Barrow, No. 1:11-CV-1015-WSD, 2011 U.S. Dist. LEXIS 109674 (N.D. Ga. Sept. 26, 2011).

Exigent Circumstances

Police authorized, in exigent circumstances, to enter search premises.

Trial court did not err in admitting into evidence the murder weapon and photographs of the crime scene because the search of the defendant's residence was authorized due to the exigent circumstances; officers arrived at the residence to conduct a welfare check and knocked on the door, which caused the door to open slightly, allowing the officers to see the victim lying motionless on the couch, and after the victim failed to respond to the officers' calls, the officers were authorized to proceed into the residence immediately to come to the victim's aid. Gibson v. State, 290 Ga. 6, 717 S.E.2d 447 (2011).

Exigent circumstances held to exist.

When two officers came to the defendant's motel room and were let in by the motel manager after a caller reported a bound, motionless body visible through the window, their testimony about their observations upon entering the room was admissible; the Fourth Amendment did not bar officers from making warrantless entries into and searches of protected areas when they had an objectively reasonable basis for believing a person within was in need of immediate aid or, at the scene of a homicide, to search the area for the presence of other victims or the killer. Teal v. State, 282 Ga. 319, 647 S.E.2d 15 (2007).

Warrantless seizure of two computers in a defendant's home was authorized by exigent circumstances, specifically, the objectively reasonable concern that the defendant threatened to destroy computer images of child pornography, images that were vulnerable to quick destruction, irreplaceable, and essential to proving that a crime had been committed. Hesrick v. State, 308 Ga. App. 363, 707 S.E.2d 574 (2011).

Exigent circumstances held not to exist.

Trial court erred in denying a defendant's motion to suppress marijuana seized from the defendant's home. Because neither the defendant's arrest for disorderly conduct under O.C.G.A. § 16-11-39 nor the defendant's arrest for a traffic violation was supported by probable cause, police officers were not justified by any exigent circumstance in going inside the home without a warrant to find a young girl who reportedly would have been left alone unsupervised because of the defendant's arrest. Williams v. State, 305 Ga. App. 657, 700 S.E.2d 653 (2010).

Administrative Inspections

DNA sample collection from convicted felons. — Former O.C.G.A. § 24-4-60 (now O.C.G.A. § 35-3-160) did not violate the Fourth Amendment, the search and seizure provisions of the Georgia Constitution, or a convicted felon's rights to privacy under the United States or Georgia Constitutions. Quarterman v. State, 282 Ga. 383, 651 S.E.2d 32 (2007).

Standing

Defendant failed to demonstrate requisite expectation of privacy, etc.

Because a defendant did not show a reasonable expectation of privacy in a hotel room needed to establish standing under the Fourth Amendment, the trial court properly denied a motion to suppress items taken from the room. The defendant did not establish that the defendant was sharing the room with the registered guest or that the defendant was an overnight guest of the registered guest; there was no evidence that the defendant had a key to the room; and there was no evidence of any luggage belonging to the defendant in the room. Smith v. State, 284 Ga. 17, 663 S.E.2d 142 (2008).

Admissibility of Evidence; Exclusionary Rule

2. Illustrative Cases

Fruit of the poisonous tree. — While non-custodial and custodial statements were properly admitted, as not vitiating the defendant's constitutional rights once defendant invoked the right to counsel, a subsequent interview initiated by police violated this right; as a result, cocaine seized through information obtained from the interview had to be suppressed as fruit of the poisonous tree. Vergara v. State, 283 Ga. 175, 657 S.E.2d 863 (2008).

Police interview room. — It was not error to admit a recorded conversation between the defendant and the defendant's parent in a police interview room as the defendant did not exhibit a subjective expectation of privacy under the Fourth Amendment in the conversation. No representations or inquiries were made as to privacy or confidentiality; police officers' entry into the room did not cause the defendant and the parent to cease talking or lower their voices; and the defendant had been put in a place containing no guarantees that communications taking place therein would remain confidential. Dickerson v. State, 292 Ga. App. 775, 666 S.E.2d 43 (2008), cert. denied, No. S08C2002, 2008 Ga. LEXIS 955 (Ga. 2008).

Videotape of the defendant's conversation with family members was properly admitted into evidence as there was no evidence that the police did anything to foster a belief that the conversation would be private. While the subject-matter of the defendant's statements might evidence a subjective expectation of privacy, the location in which the incriminating statements were made, and other circumstances surrounding the conversation determine the reasonableness of that expectation. Therefore, the defendant's conversation with family in a police interview room was not "fruit of the poisonous tree" as the defendant's personal request to meet with the family was an intervening cause. Rashid v. State, 292 Ga. 414, 737 S.E.2d 692 (2013).

Illegal search of curtilage caused all other evidence seized to be inadmissible. — Trial court properly granted defendants' motions to suppress evidence of drugs and drug paraphernalia found at the residence owned by one defendant as officers had already learned that the person they were looking for stayed at a trailer next door, and thus officers engaged in impermissible search of the curtilage when officers found a bag of drugs 45 feet from defendants' house; as a result, all evidence seized in course of subsequent searches of the property was obtained as a direct result of the impermissible intrusion into the curtilage and had to be suppressed as fruit of the poisonous tree. State v. Gravitt, 289 Ga. App. 868, 658 S.E.2d 424 (2008).

Scope of pat down search exceeded. Officer was justified in conducting a pat-down when the officer testified that the officer observed the defendant place something in defendant's pocket and then place defendant's hand in defendant's pocket; defendant refused to remove defendant's hand although the officer repeatedly instructed the defendant to do so; and, the officer became concerned for the officer's safety because of defendant's actions. However, the trial court erred in denying defendant's motion to suppress since the officer could not identify the object the officer felt as either a weapon, or by its contour and mass, contraband and thus the intrusion into defendant's pocket was impermissible. Sudduth v. State, 288 Ga. App. 541, 654 S.E.2d 446 (2007).

Failure of arbitrator to decide any and all disputes. — Although only a little time elapsed between an officer's act of pushing aside the blinds in a home and the acquisition of the inculpatory evidence, this factor is not dispositive. The record reflects that the officer pushed aside the blinds for safety reasons only after the defendant voluntarily questioned what was going on and that the officer did not view any evidence in the home that was ultimately gathered pursuant to the search warrant. Defendant's act of voluntarily opening the door of the home, attacking the officer, and then resisting arrest were intervening acts that completely purged the taint from the officer's initial unlawful act. If the defendant

had not attacked the officer and then resisted arrest, the evidence found in the home would be inadmissible as fruit of the poisonous tree. Lawson v. State, 299 Ga. App. 865, 684 S.E.2d 1 (2009), cert. dismissed, No. S10C0118, 2010 Ga. LEXIS 206 (Ga. 2010); cert. denied, No. S10C0117, 2010 Ga. LEXIS 195 (Ga. 2010).

Inevitable discovery rule. — Evidence gathered by a crime scene investigator from a motel room where the victim was found dead was admissible under the inevitable discovery rule; the information contained in the affidavit in support of the application for a search warrant that was issued after the investigator's illegal entry was gathered prior to the illegal entry. Teal v. State, 282 Ga. 319, 647 S.E.2d 15 (2007).

Inevitable discovery rule did not apply. — The inevitable discovery doctrine did not apply despite the state's position that the discovery of the methamphetamine was inevitable because the officer would not have allowed the defendant to drive the vehicle without a tag away from the scene and when the vehicle was searched the pipe and syringe would have been found, providing probable cause for the search of defendant's person and the inevitable discovery of the methamphetamine in defendant's pocket. However, no testimony was presented regarding the procedure that the officer would have followed in this situation and, even accepting the state's argument that the officer was required to impound the car since the car did not have a tag, there is nothing to show that an inventory search would have been conducted immediately at the site of the stop and, likewise, there is nothing to show that the defendant would have been present, whether the inventory search was conducted at the scene or subsequent to the vehicle being removed from the area, and thus nothing to show that the defendant would have been immediately searched. Sudduth v. State, 288 Ga. App. 541, 654 S.E.2d 446 (2007).

Probable cause for blood test of suspected intoxicated driver. — There was probable cause under the Fourth Amendment for an officer to request a blood test under O.C.G.A. § 40-5-55 from a defendant suspected of driving under the influence when the defendant showed four out of six signs of impairment on a horizontal gaze nystagmus test, admitted to drinking, smelled of alcohol, had a positive alco-sensor result, and had bloodshot eyes. The fact that an officer did not believe that there was probable cause to request the blood test did not require a different finding, as the scope of a person's Fourth Amendment rights was determined objectively. State v. Preston, 293 Ga. App. 94, 666 S.E.2d 417 (2008).

Warrantless search of probationer's residence. — Trial court erred in denying a probationer's motion to suppress the evidence seized from the probationer's apartment as, even though the entry into the apartment for the purpose of effecting an arrest of the probationer was permissible, most of the evidence was seized without a warrant after the probationer was not found in the apartment and had to be excluded under the Fourth Amendment as the search conducted was only permissible insofar as it involved the observation of items of obvious evidentiary value in plain view during the time and activities required to attempt the probationer's arrest. The probationer was never placed on notice that the probationer was going to be subjected to warrantless searches, and the state failed to demonstrate any exigent circumstances justifying the warrantless search. Jones v. State, 282 Ga. 784, 653 S.E.2d 456 (2007).

Stop of juvenile was not an illegal detention. — Juvenile court properly denied a juvenile's motion to suppress the physical and testimonial evidence as well as properly adjudicated the juvenile delinquent as a result of the evidence obtained by the police not being the product of an illegal detention. The officers who stopped the juvenile and three other cohorts had a reasonable suspicion, based on specific and articulable facts, that the juvenile should have been in school at the time and day of the stop, the juvenile matched the description of a youth involved in home burglaries with three others, and the four were stopped while canvassing the same neighborhood where a rash of burglaries had been occurring. In the Interest of J.T., 297 Ga. App. 636, 678 S.E.2d 111 (2009).

Remedies for Violation of Rights

Suppression of illegally seized evidence justified — An officer, who knew the defendant, forcibly opened the defendant's vehicle door, thereby physically restraining defendant's movement so that defendant's subsequent consent to a search of defendant's vehicle, after arriving at a location under surveillance for drug manufacturing, was invalid as the consent was the product of a wrongful detention; thus, the trial court erred in denying defendant's motion to suppress the evidence seized from the vehicle. Smith v. State, 288 Ga. App. 87, 653 S.E.2d 510 (2007).

Qualified immunity of officer in making arrest denied. — When an arrestee allegedly called an officer "a fucking asshole" and was arrested, the officer was properly denied summary judgment based on qualified immunity as to the arrestee's claims under the Fourth Amendment because the officer did not have arguable probable cause to arrest the arrestee for disorderly conduct under Georgia law since the arrestee was not shouting and did not appear to be a danger to anyone as the arrestee walked away. Merenda v. Tabor, No. 12-12562, 2013 U.S. App. LEXIS 2351 (11th Cir. Feb. 1, 2013).

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[Amendment V]

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JUDICIAL DECISIONS

Analysis

General Consideration

Failure of state to preserve evidence. — There was no merit to a defendant's claim that due process had been violated because the state allowed a car in which a shooting took place to be sold from an impound lot before the car could be tested for fingerprints and other evidence. The defendant did not argue that the state had acted in bad faith, and the record did not show bad faith. Lockheart v. State, 284 Ga. 78, 663 S.E.2d 213 (2008).

As there was no showing that a videotape of a criminal incident and crime scene had "apparent exculpatory value" because the images were small, distorted, and non-identifiable, and the state did not act in bad faith when the state failed to preserve the tape, dismissal of an indictment against the defendant due to the state's failure to preserve the videotape was error. State v. Brawner, 297 Ga. App. 817, 678 S.E.2d 503 (2009).

Cited in Rafi v. State, 289 Ga. 716, 715 S.E.2d 113 (2011).

Presentments and Indictments

1. In General

Second indictment returned while jeopardy ongoing. — Second indictment, which was apparently filed to address the eventuality that the defendants' motion to withdraw a guilty plea would be granted, was returned while the defendant's jeopardy was ongoing, and, as such, the indictment did not violate U.S. Const., amend. V, Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, or O.C.G.A. § 16-1-8. Phillips v. State, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

Double Jeopardy

1. In General

Scope of protection generally.

Retrial of a charge of possession of a firearm by a convicted felon would not itself violate double jeopardy or any other constitutional right, since the right not to be prosecuted on a count which was quashed for the second time was purely statutory pursuant to O.C.G.A. § 17-7-53.1. Langlands v. State, 282 Ga. 103, 646 S.E.2d 253 (2007).

Defense of previously overcome charges.

Jury, in acquitting defendant of malice murder, felony murder, and aggravated assault at a prior trial, necessarily determined that defendant acted in self-defense, and self-defense was an element of voluntary manslaughter. Therefore, double jeopardy and collateral estoppel barred the state from re-prosecuting the defendant for voluntary manslaughter. Roesser v. State, 294 Ga. 295, 751 S.E.2d 297 (2013).

First conviction set aside because of error.

Double Jeopardy Clause in U. S. Const., amend. V and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII did not bar a second trial on the same charges because the defendant's motion for new trial was granted due to an erroneous evidentiary ruling. State v. Caffee, 291 Ga. 31, 728 S.E.2d 171 (2012).

Guilty plea based on single incident

waived double jeopardy challenge. — Because defendant pled guilty to four misdemeanor counts of public indecency based on one lewd act witnessed by several school children, and willingly and knowingly accepted the specified sentences as to the four counts, the defendant waived any claim before the habeas court that there was in fact only one act and that the resulting sentences were void on double jeopardy grounds. Turner v. State, 284 Ga. 494, 668 S.E.2d 692 (2008).

Trial court erred in granting the defendant's plea in bar because double jeopardy did not bar a second trial on the same charges since the retrial was granted due to an erroneous evidentiary ruling; the order granting a new trial did not find the evidence was legally insufficient to sustain the verdict, but instead, the second trial judge granted the new trial based on the original trial court's error in admitting an exhibit to prove that defendant had a prior felony conviction after the defendant offered to stipulate that the defendant was a convicted felon. State v. Caffee, 291 Ga. 31, 728 S.E.2d 171 (2012).

2. Attachment of Jeopardy

No jeopardy where jurisdiction lacking.

After a defendant was granted a directed verdict on the basis that the state failed to prove venue in a criminal prosecution for driving under the influence per se, retrial was not barred under U.S. Const., amend. V and O.C.G.A. § 16-1-8 because, while venue had to be laid in the county in which the crime was allegedly committed under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2 and venue was a jurisdictional fact, failure to prove venue was a procedural error that implied nothing as to defendant's guilt or innocence. Hudson v. State, 296 Ga. App. 758, 675 S.E.2d 603, cert. denied, No. S09C1163, 2009 Ga. LEXIS 413 (Ga. 2009); cert. denied, 558 U.S. 1076, 130 S. Ct. 799, 175 L. Ed. 2d 559 (2009).

Application of modified merger rule. — Modified merger rule, which speaks to the validity of a verdict on a charge of felony murder when the jury also finds the accused guilty of voluntary manslaughter, is effective at the time the jury renders the jury's verdict and is not destroyed by the granting of a motion for new trial on the voluntary manslaughter charge; likewise, the presence or absence of a separate charge of aggravated assault in the indictment has no effect on a court's application of the modified merger rule because while the existence of a separate aggravated assault charge must be carefully considered in applying the rule and making determinations as to proper sentencing, its existence does not render the rule inapplicable. Williams v. State, 288 Ga. 7, 700 S.E.2d 564 (2010).

There is no meaningful distinction between an implicit acquittal based on a guilty verdict for a lesser included offense and the vacation of a verdict under the modified merger rule because in both cases the accused is placed in jeopardy, the jury is given a full opportunity to return a verdict on the greater charge, and the verdict rendered results in no conviction being entered; in both cases there can be no appeal because the accused's jeopardy has ended, and in both cases double jeopardy prevents retrial. Williams v. State, 288 Ga. 7, 700 S.E.2d 564 (2010).

3. Prosecution by More Than One Sovereign

When multiple prosecution not prohibited.

As the defendant's theft by taking an automobile occurred in both Georgia and Kentucky, the fact that the defendant was prosecuted in Kentucky did not bar Georgia from also prosecuting the defendant under the dual sovereignty doctrine of the double jeopardy clause; further, O.C.G.A. § 16-1-8(c) was inapplicable because there was not a federal prosecution for the same crime. Jackson v. State, 284 Ga. 826, 672 S.E.2d 640 (2009).

4. Determination as to Whether Same Offenses are Involved

Conviction of lesser offense amounts to implicit acquittal of greater offense.

State's re-prosecution of the defendant for felony murder was barred by double jeopardy after the jury found the defendant guilty of the voluntary manslaughter of the same victim because the jury was

given a full opportunity to return a verdict on the felony murder charge, which the jury did; although no judgment of conviction or sentence was entered on the jury's verdict of guilt on the felony murder charge, the defendant was placed in jeopardy of conviction of that charge in the first trial and could not, consistent with the Fifth Amendment's double jeopardy clause, be placed at risk of conviction again. Williams v. State, 288 Ga. 7, 700 S.E.2d 564 (2010).

No exposure to double jeopardy. Defendant's second prosecution for speeding and DUI was not barred by double jeopardy because the defendant's counsel joined in the state's motion for a mistrial in the first case due to the prosecutor's misstating the evidence in closing; further, the record showed that the prosecutor's error was inadvertent and not in bad faith. Williams v. State, 311 Ga. App. 783, 717 S.E.2d 264 (2011).

DUI and serious injury by vehicle convictions. — Proof that the defendant was guilty of driving under the influence (DUI) under O.C.G.A. § 40-6-391 was a required element for convicting the defendant of serious injury by vehicle under O.C.G.A. § 40-6-394, and while proof of serious injury by vehicle also required proof of an additional element, bodily harm, the DUI charge included no element that was not also contained in the crime of serious injury by vehicle; accordingly, the Blockburger test was not met, and the subsequent indictment for serious injury by vehicle violated the double jeopardy clause of the Fifth Amendment. Thus, defendant's plea in bar was a valid exercise of the federal double jeopardy clause. Garrett v. State, 306 Ga. App. 429, 702 S.E.2d 470 (2010).

Defendant properly sentenced on separate counts of attempting to elude police. — Trial court properly sentenced the defendant on five separate counts of attempting to elude a police officer because the evidence supported the jury's conclusion that the defendant willfully led police on a dangerous high speed chase after being given clear signals by five separate police vehicles to stop; it is the act of fleeing from an individual police vehicle or police officer after being given a proper visual or audible signal to stop from that individual police vehicle or officer, and not just the act of fleeing itself, that forms the proper "unit of prosecution" under O.C.G.A. § 40-6-395. Smith v. State, 290 Ga. 768, 723 S.E.2d 915 (2012).

Acquittal on some offenses did not bar retrial on other offenses with different elements. — Although a defendant was acquitted of charges relating to the beating death and kidnapping of a robbery victim in a first trial, the defendant was convicted of armed robbery and assault of the victim. On the defendant's retrial, granted due to the state's failure to prove venue in the first trial, the state was not barred from re-prosecuting the defendant for armed robbery and assault. Patmon v. State, 303 Ga. App. 151, 693 S.E.2d 120 (2010).

5. Imposition of Other Penalties for Same Act

Modification of bond conditions were not criminal punishment for double jeopardy purposes. — Conducting a hearing to modify the bond conditions of a third-time DUI offender and placing limitations upon the offender's driving privileges, predicated upon the necessity to protect the welfare and safety of the citizens of Georgia from a recidivist offender, was not punishment, nor was the hearing prosecution, for the purposes of double jeopardy. Strickland v. State, 300 Ga. App. 898, 686 S.E.2d 486 (2009).

Nonsummary criminal contempt proceedings. — Nonsummary criminal contempt proceedings can trigger the Fifth Amendment's double jeopardy bar to subsequent prosecution. Tanks v. State, 292 Ga. App. 177, 663 S.E.2d 812 (2008).

Stalking and violation of protective order. — When a defendant was indicted for aggravated stalking under O.C.G.A. § 16-5-91(a) in violation of a protective order issued under O.C.G.A. § 19-13-4, a criminal contempt proceeding based on the same incident could trigger the double jeopardy clause of the Fifth Amendment. The protective order violation contained no elements not contained in the criminal offense; furthermore, the protective order specifically enjoined the defendant from surveilling the subject of the order for the

purpose of harassing and intimidating the subject, as also proscribed by § 16-5-91(a). Tanks v. State, 292 Ga. App. 177, 663 S.E.2d 812 (2008).

6. Mistrial

Trial court can retry a defendant following mistrial, etc.

As the trial court did not abuse the court's discretion in declaring a mistrial sua sponte on the basis that evidence inadvertently taken to the jury room which contained the defendant's exculpatory statement had irreparably prejudiced the state's right to a fair trial, and that curative instructions would be insufficient, the defendant's retrial was not barred by double jeopardy. Varner v. State, 285 Ga. 334, 676 S.E.2d 209 (2009).

After the trial court excused a juror who had been left a telephone message stating that the defendant was a good person, the juror discussed the evidence with the other jurors and made negative comments in an apparent effort to discredit the prosecution. As the trial court concluded that the excused juror may have had a bias that affected the other jurors, it properly declared a mistrial; therefore, the defendant's retrial did not violate the double jeopardy ban. Brown v. State, 285 Ga. 324, 676 S.E.2d 221 (2009).

Failure to consider less severe alternatives to mistrial.

Trial court abused the court's discretion in declaring a mistrial and abridging defendant's constitutional right to be tried by the originally impaneled jury without first considering less drastic alternatives when the assigned courtroom was unavailable at the appointed time. The procedure the court used was flawed, not the result. A trial court is not categorically required to grant a continuance under similar circumstances; merely the court should consider a continuance as an alternative to declaring a mistrial. Since the trial court told defense counsel that if the defendant did not plead guilty, the court would declare a mistrial, the court took little or no heed to McGee's constitutional rights thereby constituting an abuse of discretion. McGee v. State, 287 Ga. App. 839, 652 S.E.2d 822 (2007).

7. Effect of Appeal

Retrial not barred by failure to properly establish venue. — Although there was sufficient evidence to support a juvenile's adjudication of delinquency based on the finding that the juvenile had committed acts, which, had the juvenile been an adult, would have supported a conviction for burglary in violation of O.C.G.A. § 16-7-1(a), the adjudication was reversed because the state failed to present any evidence to establish proof of venue beyond a reasonable doubt. The investigating officers' county of employment did not, in and of itself, constitute sufficient proof of venue to meet the beyond a reasonable doubt standard; however, the reviewing court noted that retrying the juvenile was not prohibited under the Double Jeopardy Clause, because the evidence presented at trial was otherwise sufficient to support the adjudication of delinquency. In the Interest of B.R., 289 Ga. App. 6, 656 S.E.2d 172 (2007).

Sentencing error corrected by Supreme Court of Georgia on appeal averted double jeopardy violation. — While the defendant was correct in asserting that the trial court should not have imposed sentence on both felony murder guilty verdicts, the Supreme Court of Georgia corrected that error on appeal when it affirmed the judgment of conviction and sentence only on the count 3 guilty verdict, and the defendant's argument was not based on what actually occurred, but upon speculation that, had the trial court imposed the correct sentence, it would have done so by merging count 3 into count 2. Thus, even assuming, arguendo, that such speculation warranted a review of the sentence imposed, such presented no basis for reversal because nothing required the trial court to merge the two counts in the way the defendant proposed. Brady v. State, 283 Ga. 359, 659 S.E.2d 368 (2008).

8. Resentencing

Resentencing to include the mandatory fine did not violate double jeopardy. — Because O.C.G.A. § 16-13-31(f)(1) required a mandatory minimum sentence for trafficking in

methamphetamine of ten years and a $200,000 fine, and the sentence imposed by the trial court failed to include the fine, the trial court's resentencing to add the fine after defendant began serving the sentence was valid and did not violate defendant's double jeopardy rights. The suspended sentence provisions of O.C.G.A. § 17-10-1(a) were inapplicable to the mandatory sentence provisions of § 16-13-31, and there was no indication that the trial court intended to suspend the fine portion. Strickland v. State, 301 Ga. App. 272, 687 S.E.2d 221 (2009).

Self-Incrimination

1. In General

Criminal Procedure Discovery Act. — The requirement of O.C.G.A. § 17-16-4, part of the Criminal Procedure Discovery Act, that a defendant disclose any mitigating evidence the defendant intended to introduce in the presentence hearing did not violate the defendant's privilege against self-incrimination; statements of witnesses a defendant intends to call to testify are not personal to the defendant, and although the disclosure of the list of witnesses a defendant intends to call is personal to the defendant, a trial court can exercise its discretion to specify the time, place, and manner of making the discovery and to enter such orders as seem just under the circumstances when self-incrimination concerns arise, such as a protective order or a continuance pending the completion of the guilt/innocence phase of the trial. Muhammad v. State, 282 Ga. 247, 647 S.E.2d 560 (2007).

Defendant driven to hospital by police not in custody and Miranda not required. — Since the defendant was not under formal arrest or any restraint when an officer questioned the defendant in the defendant's hotel room and drove the defendant to a hospital, Miranda warnings were not required. That the defendant was the focus of a murder investigation did not require the officer to give Miranda warnings; the relevant inquiry was whether a reasonable person in the defendant's situation would have perceived that the person was in custody. Timmreck v. State, 285 Ga. 39, 673 S.E.2d 198 (2009).

Assertion of privilege must be clear. Defendant's statements made to law enforcement during an interrogation in jail were properly suppressed as made in violation of the defendant's Fifth Amendment right to remain silent because the defendant's statement that "I ain't got no more to say. I mean, this is it" was an unequivocal assertion of the right against self-incrimination; statements made prior to that assertion were not suppressed as the defendant was properly given Miranda rights. State v. Moon, 285 Ga. 55, 673 S.E.2d 255 (2009).

Corporate officers may be compelled to produce corporate records, etc.

Defendant in a criminal case, an attorney who was the sole shareholder of a professional corporation, was properly held in civil contempt for not producing a noncompetition agreement between the corporation and a former employee. The agreement was a corporate document, and the defendant had been subpoenaed to produce the document as a corporate agent; thus, the defendant could not assert the defendant's personal right against self-incrimination and the small size of the corporation was immaterial. Thompson v. State, 294 Ga. App. 363, 670 S.E.2d 152 (2008).

Statement properly admitted.

In a prosecution for felony murder, armed robbery, and burglary, a defendant's post-Miranda statements were properly admitted at trial as a detective's telling the defendant that the detective knew that the defendant was not the shooter did not constitute the hope of a lighter sentence that tainted the voluntariness of the defendant's statements. Jackson v. State, 284 Ga. 484, 668 S.E.2d 700 (2008).

Question first, warn later tactic of investigating resulted in inadmissible statements. — Patrol officer's question-first, warn-later tactic of interrogating a burglary suspect rendered both statements given to the patrol officer and statements later given to an investigator after Miranda warnings inadmissible. The defendant was not advised that the defendant's earlier statement to the patrol officer could not be used. State v.

Kendrick, 309 Ga. App. 870, 711 S.E.2d 420 (2011).

2. Interrogations

What constitutes "custodial interrogation".

Trial court erred in suppressing a defendant's pre-Miranda statements based on the court's findings that police had probable cause to arrest and that the defendant was the focus of the investigation as these considerations were irrelevant for determining whether the defendant was "in custody" for Miranda purposes. The proper inquiry was how a reasonable person in the defendant's position would have perceived the situation. State v. Folsom, 285 Ga. 11, 673 S.E.2d 210 (2009).

Custodial interrogation not found.

The trial court did not err in admitting the defendant's statements made at a hospital to a sheriff's deputy and an investigator, as the statements were given while the defendant was in a medical, rather than an investigative, setting; moreover, the fact that the officers might have suspected the defendant of having committed a murder did not render the statements at issue violative of Miranda, and thus subject to suppression. Jennings v. State, 282 Ga. 679, 653 S.E.2d 17 (2007).

Question from intake officer was not a general greeting outside of Miranda. — With regard to a defendant's convictions for improper lane change, serious injury by vehicle while driving under the influence, and misdemeanor obstruction of an officer, the defendant obtained a reversal of the convictions based on the trial judge violating the defendant's right to be present at all stages of the proceeding by communicating with the jury inappropriately; however, for retrial purposes, it was also determined that, given the totality of the circumstances, the defendant was subjected to an "interrogation" in violation of the privilege against self-incrimination as a result of an intake officer asking the defendant how the defendant came to be at the police station. Accordingly, the response to the question was inadmissible for any purpose other than impeachment. Wells v. State, 297 Ga. App. 153, 676 S.E.2d 821 (2009).

Statements not made in context of "custodial interrogation".

When a defendant went to a police station to discuss the theft of tire rims from the defendant's vehicle, and later was confronted with questioning about the killing of the person who stole the rims, it was error to suppress the statements the defendant made before the defendant was confronted about the killing. The defendant was not in custody before being confronted with the killing. State v. Pye, 282 Ga. 796, 653 S.E.2d 450 (2007).

Because a defendant had come voluntarily to a police station for an interview and was not prevented from leaving or terminating the interview, the defendant was not in custody; thus, there was no violation of the defendant's Fifth Amendment right to counsel under the United States Supreme Court's decision in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L. Ed. 2d 378 (1981), which applied only to custodial interrogation. Petty v. State, 283 Ga. 268, 658 S.E.2d 599 (2008).

As the defendants voluntarily went to the police station, were not under formal arrest at any time during their interviews, and were told before the interview that the defendants were free to leave, a reasonable person in the defendants' situation would not have felt so restrained as to equate to a formal arrest. Therefore, Miranda warnings were not required. Carter v. State, 285 Ga. 394, 677 S.E.2d 71 (2009).

Warnings need not be repeated in subsequent interrogation.

It was not error to admit a defendant's statements to an expert appointed pursuant to O.C.G.A. § 17-7-130.1 to examine the defendant upon the defendant's assertion of an insanity defense because: (1) the state had a statutory right, under O.C.G.A. § 17-7-130.1, to call the expert to rebut the testimony of the defendant's expert regarding the defendant's mental state at the time of the crimes charged; (2) the defendant had no Sixth Amendment right to counsel during the expert's examination or Fifth Amendment right requiring the repetition of the defendant's Miranda rights during the interview with the appointed expert; and (3) the defen-

dant's counsel was aware of the psychiatric interview and chose not to attend. Walker v. State, 290 Ga. 467, 722 S.E.2d 72 (2012).

Miranda warnings inserted during continuing interrogation. — Statements that two defendants made after they were given Miranda warnings were inadmissible. When Miranda warnings were inserted during coordinated and continuing interrogation, as they had been here, they were likely to mislead a defendant. State v. Pye, 282 Ga. 796, 653 S.E.2d 450 (2007).

Recording conversations while defendant in jail. — Recordings of telephone conversations the defendant had with the defendant's mother while the defendant was in jail were properly admitted into evidence; the Miranda warnings against self-incrimination did not apply because there was no interrogation, and the defendant had no reasonable expectation of privacy in the calls under the Fourth Amendment. Preston v. State, 282 Ga. 210, 647 S.E.2d 260 (2007).

Police not required to obtain waiver of right to remain silent prior to interrogation. — Police are not required to obtain from the accused a waiver of Miranda rights before beginning an interrogation; such a requirement is at odds with the principle that courts can infer a waiver of Miranda rights "from the actions and words of the person interrogated", and that any waiver, express or implied, may be contradicted at any time by an invocation of the rights to counsel and to remain silent. Hardman v. Shinseki, No. 08-1470, 2010 U.S. App. LEXIS 4379 (6th Cir. June 1, 2010).

Accused's silence during an interrogation did not invoke the right to remain silent, because a suspect's Miranda right to counsel must be invoked "unambiguously", and the accused waived the right to remain silent when the accused knowingly and voluntarily made a statement to police. Once the state establishes that a Miranda warning was given and that it was understood by the accused, an uncoerced statement establishes an implied waiver, and the record clearly showed that the accused waived the right to remain silent: (1) the lack of any contention that the accused did not understand the rights indicates that the accused knew what was given up when the accused spoke; (2) the accused's answer to a question the interrogator asked about God was a "course of conduct indicating waiver" of the right to remain silent in that, had the accused wanted to remain silent, the accused could have said nothing in response or unambiguously invoked the accused's Miranda rights, thus ending the interrogation — that the accused made a statement nearly three hours after receiving a Miranda warning did not overcome the fact that the accused engaged in a course of conduct indicating waiver; and (3) there was no evidence that the statement was coerced, as the accused did not claim that police threatened or injured the accused or that the accused was fearful, the interrogation took place in a standard-sized room in the middle of the day, and there is no authority for the proposition that a three-hour interrogation is inherently coercive. Hardman v. Shinseki, No. 08-1470, 2010 U.S. App. LEXIS 4379 (6th Cir. June 1, 2010).

Defendant's statement that "I can stop the interrogatory" was not an unequivocal invocation of the defendant's Fifth Amendment right to remain silent requiring that interrogation cease, but rather was an equivocal statement that did not require an officer to stop questioning the defendant. The rule in Davis v. United States, 512 U. S. 452, 114 S. Ct. 2350, 129 L. Ed.2d 362 (1994), that, if a suspect's statement is not an unambiguous or unequivocal request for counsel, officers have no obligation to stop questioning the suspect, also applies to invocations of the Fifth Amendment right to remain silent. Perez v. State, 283 Ga. 196, 657 S.E.2d 846 (2008).

Accused found to be in custody. — The evidence supported a finding that a defendant was in custody before Miranda warnings were given; thus, the statements the defendant made before the warnings were inadmissible. Officers came to the store where the defendant worked and handcuffed the defendant, took the defendant to a private room in the store, walked the handcuffed defendant out of the store, and drove the defen-

dant to the police station, where the defendant was questioned in a closed interrogation room. State v. Pye, 282 Ga. 796, 653 S.E.2d 450 (2007).

Equivocal request for counsel.

The rule in Davis v. United States, 512 U. S. 452, 114 S. Ct. 2350, 129 L. Ed.2d 362 (1994), that, if a suspect's statement is not an unambiguous or unequivocal request for counsel, officers have no obligation to stop questioning the suspect, also applies to invocations of the Fifth Amendment right to remain silent. Perez v. State, 283 Ga. 196, 657 S.E.2d 846 (2008).

Spontaneous statement admissible.

Because the record failed to contain any indication that the defendant: (1) informed the officers of defendant's desire to end an interview; (2) wished to speak with counsel; or (3) wished to leave the station, and after the statements were made the defendant was driven home by an officer, the defendant was not in custody for purposes of Miranda; therefore, admission of these non-custodial statements was proper. Vaughn v. State, 282 Ga. 99, 646 S.E.2d 212 (2007).

Because the defendant's spontaneous outburst was voluntarily made and not the product of police interrogation, the evidence was not subject to a hearsay exception, Miranda warnings were not required, and the statement was admissible. Tennyson v. State, 282 Ga. 92, 646 S.E.2d 219 (2007).

Response to police officer's answer to the defendant's own question.

Because the undisputed evidence established that a juvenile defendant was informed of the right to have a parent present during an interview with police in which a custodial statement was obtained, but did not invoke that right, there was no error in allowing the juvenile defendant's statement into evidence. Green v. State, 282 Ga. 672, 653 S.E.2d 23 (2007).

Although resulting in a defendant confessing to a murder, responses an arresting officer made to questions posed by the defendant did not result in a violation of the defendant's Miranda rights as the responses were not the product of a custodial interrogation and there was no evidence of a plan or design on the part of the police to interrogate the defendant without first advising the defendant of the defendant's rights under Miranda. Byrum v. State, 282 Ga. 608, 652 S.E.2d 557 (2007).

Questioning about failure to give information after invoking right to remain silent. — State impermissibly questioned the defendant as to whether after the defendant had invoked the right to remain silent, the defendant had shared certain information concerning the defendant's defense with law enforcement officers. Boivin v. State, 298 Ga. App. 411, 680 S.E.2d 415 (2009).

3. Waiver and Voluntariness Generally

Statements admissible. — Statements the defendant made to police at the hospital and the police station were admissible because the defendant was not in custody at the hospital and, thus, no Miranda warnings were required, and the defendant voluntarily waived those rights at the police station. Schutt v. State, 292 Ga. 625, 740 S.E.2d 163 (2013).

No Miranda warnings were required, etc.

Defendant properly waived the defendant's Miranda rights so that the defendant's subsequent statements were made voluntarily because the defendant spoke with police detectives and signed a written statement regarding the crimes committed by the defendant before the defendant was arrested. Furthermore, the officers who interviewed the defendant did not breach protocol because, when the officers had the defendant sign the form, the officers did not have to have the defendant separately initial each right that the defendant waived. Herbert v. State, 288 Ga. 843, 708 S.E.2d 260 (2011).

If defendant initiates communications, etc.

Because a police officer who heard the defendant's statement that the defendant shot after someone because the person took some marijuana from the defendant testified that the defendant uttered the statement spontaneously, and the police officer had not questioned or threatened the defendant, nor did anything to have coerced the defendant to have made the

statement, the trial court's ruling that the defendant made the statement freely and voluntarily was not clearly erroneous. Johnson v. State, 287 Ga. App. 352, 651 S.E.2d 450 (2007).

It was not error to refuse to suppress the statements the defendant made during an interview with police because the defendant pointed to nothing in the record that showed the defendant had previously invoked the defendant's Fifth Amendment right to have counsel present during custodial interrogation; the fact that counsel was appointed for the defendant at a prior appearance before the trial court did not afford the defendant relief under the Sixth Amendment, and, furthermore, the interview was at the defendant's instigation. Dixon v. State, 294 Ga. 40, 751 S.E.2d 69 (2013).

Waiver must be knowing and voluntary.

Suspect can always make a spontaneous, voluntary statement which would be admissible at trial. Therefore, a defendant did not knowingly and intelligently waive the Sixth Amendment right to counsel by executing a Miranda waiver, as the defendant signed the waiver only after police erroneously told the defendant signing the waiver was a precondition to telling the defendant's "side of the story." State v. Darby, 284 Ga. 271, 663 S.E.2d 160 (2008).

Defendant making statement after signing waiver.

Defendant's videotaped statement made to police during a custodial interrogation was admissible because the defendant made the statement voluntarily after the defendant was advised of, and waived, the defendant's Miranda rights, and the defendant presented no evidence the statement was made under duress or coercion. McCoy v. State, 292 Ga. 296, 736 S.E.2d 425 (2013).

Defendant's custodial statement was admissible because the statement was made during questioning prompted by the defendant, after the defendant signed a written waiver of rights form. Smith v. State, 292 Ga. 620, 740 S.E.2d 158 (2013).

Ineffective invocation of right to remain silent.

Defendant's statement during questioning was admissible into evidence because the defendant made no more than an equivocal invocation of the defendant's right to remain silent, and the defendant did not articulate a desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would have understood the articulation to be an assertion of the right to remain silent. Thus, the interrogating officer had no obligation to stop questioning the defendant. Weaver v. State, 288 Ga. 540, 705 S.E.2d 627 (2011).

Defendant knowingly and intelligently waived the fifth amendment privilege, etc.

Trial court properly admitted defendant's statement at trial with regard to defendant's conviction of felony murder and possession of a firearm in connection with the shooting death of another as the evidence supported the trial court's conclusion that defendant made a knowing, voluntary, and intelligent waiver of defendant's rights before making the statement to police; the evidence established that Georgia police officers went to the city in the state of Florida where defendant fled and had been arrested and, prior to the interview, defendant was read Miranda rights and agreed to speak with the officers after informing the officers that defendant understood defendant's rights. The evidence further showed that no promises or threats were made to defendant to get defendant to speak and at no time did defendant ask for the questioning to stop. Martinez v. State, 283 Ga. 122, 657 S.E.2d 199 (2008).

Waiver of privilege by juveniles.

Given an analysis of the Riley factors, and the fact that the juvenile defendant knowingly and voluntarily waived any constitutional rights due under Miranda, suppression of a custodial statement to law enforcement was not required. Green v. State, 282 Ga. 672, 653 S.E.2d 23 (2007).

The trial court did not err in finding that a defendant made a knowing and intelligent waiver of the defendant's federal and state constitutional rights prior to giving a statement to police because a juvenile waiver-of-rights form was read in its entirety to, and signed by, the defen-

dant and the defendant's parent, and neither the defendant nor the defendant's parent ever invoked the defendant's right to remain silent or asked that the questioning cease. Norris v. State, 282 Ga. 430, 651 S.E.2d 40 (2007).

Voluntary inculpatory statements need not be suppressed.

Because the evidence sufficiently showed that the defendant made a rational and intelligent choice to waive the rights outlined under Miranda and speak with police detectives on two separate and distinct occasions, the trial court did not err in denying a motion to suppress said statements. Starks v. State, 283 Ga. 164, 656 S.E.2d 518 (2008).

Statements the defendant made at the scene and the station during an interview were admissible, because the defendant received and waived Miranda warnings before making the incriminating statements, and the defendant's interrogators testified that the interrogators made no threats or promises and did not coerce the defendant in any way. Simmons v. State, 291 Ga. 664, 732 S.E.2d 65 (2012).

Voluntary inculpatory statements not suppressed even when defendant consumed Ecstasy. — Trial court did not err in denying the defendant's motion to exclude a statement made to a detective because the statement was made while the defendant was under the influence of Ecstasy and was induced by the hope of a light sentence because the defendant never told the detective that the defendant had taken Ecstasy a few hours earlier and the detective credibly testified that no promise of leniency was made. Leonard v. State, 292 Ga. 214, 735 S.E.2d 767 (2012).

Trial court's determinations on voluntariness of waiver must be accepted unless clearly erroneous.

Trial court's findings that the defendant was advised of the defendant's Miranda rights, that the defendant voluntarily waived those rights, and that the defendant voluntarily made statements to the police were clearly erroneous as to statements the defendant made prior to being advised of the defendant's Miranda rights because the trial court did not find the facts necessary to support those findings. Reaves v. State, 284 Ga. 181, 664 S.E.2d 211 (2008).

4. Voluntariness of Confessions

Mental ability and unfamiliarity with the criminal process, etc.

Defendant's claim that a statement to police was involuntary due to drug and alcohol impairment was properly rejected as the defendant admitted during the interview to consuming only two tranquilizers due to nervousness, and the interviewers testified that the defendant did not appear to be impaired and communicated with them in a lucid and coherent manner. Carter v. State, 285 Ga. 394, 677 S.E.2d 71 (2009).

If defendant is aware of rights, and not under duress nor drugs or alcohol, confession is voluntary.

Defendant's confessions to the murder of defendant's spouse made to police were voluntary: the defendant was 37 years old, could read and write, had graduated from high school, and was not under the influence of drugs or alcohol. Defendant accompanied police to the station voluntarily, was not handcuffed, and was free to leave at any time. Turner v. State, 287 Ga. 793, 700 S.E.2d 386 (2010).

Trial court did not err in concluding that the defendant made a knowing and voluntary waiver of the defendant's Miranda rights, despite the testimony of the defendant's expert witness to the contrary because: (1) the detective who interviewed the defendant testified that the defendant said that the defendant was not under the influence of alcohol or drugs; (2) the detective had experience in dealing with people under the influence of alcohol or drugs; (3) the detective saw no evidence that the defendant was under the influence of alcohol or drugs; (4) the defendant had no difficulty speaking or communicating; (5) the detective read the defendant the defendant's Miranda rights; and (6) the defendant said that the defendant understood each of the rights. Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Involuntariness not shown. — Trial court properly refused to suppress a defendant's confession. The evidence enabled the trial court to find that the defendant's relative was present during most of

the questioning, that the defendant was able to speak privately with the relative on occasion, that the defendant was not under the influence of drugs or alcohol, that the defendant was not threatened or offered any hope of benefits, and that the defendant was not handcuffed or otherwise restrained prior to confessing to participation in a shooting; furthermore, although the defendant claimed that the statement was not knowing and voluntary because of the defendant's limited intellect, the defendant was able to provide some involved explanations to police, a police interviewer saw no confusion about the defendant's rights, and the relative testified that the defendant never indicated that the defendant felt that the defendant had to talk to the police. Boseman v. State, 283 Ga. 355, 659 S.E.2d 364 (2008).

Defendant, aged 16 at the time of an interview in which defendant gave statements to police about a home invasion, failed to show that the statement was involuntary merely because it was given outside the presence of defendant's grandmother and uncle; defendant's relatives gave permission for defendant to be questioned, and the interview lasted only 35-45 minutes. Bowman v. State, 324 Ga. App. 734, 751 S.E.2d 532 (2013).

Voluntary confession found. — After the investigating officer testified that defendant was not under arrest when the defendant gave the statement, that the defendant was nonetheless advised of defendant's Miranda rights and appeared to understand those rights, and that the defendant was not threatened, coerced, or promised anything in exchange for the defendant's statement, the district court's decision that the statement was voluntary was not clearly erroneous. Escutia v. State, 277 Ga. 400, 589 S.E.2d 66 (2003) (Unpublished).

5. Voluntariness of Guilty Pleas

Plea that is intelligent and voluntary must be affirmatively shown.

An inmate did not make a guilty plea voluntarily, knowingly, and intelligently when the trial court did not advise the inmate of the federal privilege against compulsory self-incrimination, and trial counsel's testimony did not indicate the specific rights of which the inmate was advised. Arnold v. Howerton, 282 Ga. 66, 646 S.E.2d 75 (2007).

Determination of voluntariness where questioned in habeas corpus action.

Habeas court did not err in denying a petition for a writ of habeas corpus because the wording in the waiver of rights form adequately conveyed to the petitioner in a manner reasonably intelligible to the petitioner the core principles of the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment, and it was apparent to any reasonable person that the information conveyed about the right against self-incrimination was pertinent to a knowing and intelligent waiver of that right at trial; a criminal defendant could not reasonably confuse his or her right to remain silent at trial, which is waived as the result of a knowing and intelligent decision to plead guilty to a charged offense, with his or her understanding of that right as it may have been conveyed to him or her in the separate context of custodial police interrogation pursuant to Miranda. Brown v. State, 290 Ga. 50, 718 S.E.2d 1 (2011).

Extrinsic evidence did not support finding right against self-incrimination was knowingly, intelligently, or voluntarily waived. — Mere speculation that an appellant inmate had been informed of all three of the Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d 274 (1969) rights the inmate would be waiving by entering a guilty plea was insufficient to support a finding that extrinsic evidence showed that the inmate knowingly, intelligently, and voluntarily waived the inmate's right to self-incrimination, particularly in light of the fact that defense counsel testified during a hearing on the inmate's habeas petition that counsel did not recall what rights counsel might have discussed with the inmate but that it was not counsel's practice to get into the specifics of any particular right being waived. Denson v. Frazier, 284 Ga. 858, 672 S.E.2d 625 (2009).

Guilty plea properly entered. — Although defendant contended that the trial

court erred by denying defendant's motion for an out-of-time appeal, and argued that the language used by the prosecutor in informing defendant of defendant's rights at the guilty plea hearing failed to convey to defendant that the defendant would be waiving defendant's privilege against compulsory self-incrimination, that contention was belied by the transcript, which revealed that, at the guilty plea hearing, the assistant district attorney adequately conveyed to appellant the core principles of the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment. To the extent defendant distinguished the "right to remain silent" as separate from the privilege against self-incrimination, that right was not one of the enumerated rights that had to be explained to a defendant during a Boykin colloquy; moreover, nothing in Uniform Superior Court Rule 33.8, which set forth the procedure for trial courts to follow before accepting a plea of guilty, required a defendant to be informed of that right, and thus, defendant's guilty plea was not rendered invalid for that reason. Adams v. State, 285 Ga. 744, 683 S.E.2d 586 (2009).

Reversal of guilty plea. — Defendant's conviction for malice murder, which was based upon a guilty plea, was reversed because the record did not show that the defendant was advised of the right against self-incrimination as required by Boykin; the state did not fulfill the state's duty to ensure that the defendant's guilty plea was constitutionally valid, the state apparently did not ensure that the defendant was advised of and had effective representation regarding the right to appeal the conviction, and the state did not litigate the merits of the defendant's guilty plea in the habeas corpus hearings since the record could have been expanded. Tyner v. State, 289 Ga. 592, 714 S.E.2d 577 (2011).

6. Silence of the Accused

Prosecutorial comment on defendant's silence is error.

In a case in which ineffective assistance of counsel was claimed due to counsel's failure to object to a comment in the prosecutor's closing argument that the defendant could have given the defendant's version of the facts of a domestic dispute to the police, the appellate court improperly relied on exclusions to comments on a defendant's silence in Morrison v. State, 554 S.E.2d 190 (2001); the court overruled Morrison based on the bright-line rule in Mallory v. State, 409 S.E.2d 839 (1991), that, with reference to former O.C.G.A. § 24-3-36 (see now O.C.G.A. § 24-8-801), comment upon a defendant's silence or failure to come forward was far more prejudicial than probative. Reynolds v. State, 285 Ga. 70, 673 S.E.2d 854 (2009).

Prosecutor's comment that not one witness disputed state's witnesses. — Prosecutor's assertion that "not one witness came in here to dispute anything that the state's witnesses said" was commenting on defendant's failure to present evidence, not defendant's right to remain silent. Brown v. State, 278 Ga. 544, 604 S.E.2d 503 (2004).

No improper comment on right to remain silent by informing jury of defendant's request to terminate interview. — State did not improperly comment on the defendant's pre-arrest right to remain silent because informing the jury of the defendant's termination of a custodial interview and invocation of the right to counsel did not amount to an improper comment on the right to remain silent warranting the reversal of the defendant's conviction. McClarin v. State, 289 Ga. 180, 710 S.E.2d 120 (2011), cert. denied, 132 S. Ct. 1004, 181 L. Ed. 2d 745 (2012).

7. Testimony and Cross-Examination

Defendant improperly required to testify to present evidence of violence by victim. — Because the state's evidence established a prima facie case of justification through the defendant's statement, in which the defendant claimed to have shot the victim out of self-defense, it was error to refuse to admit evidence of violence by the victim toward a third party unless the defendant testified. The error, which implicated the Fifth Amendment, was not harmless because when the defendant took the stand, the state was able on cross-examination to

undermine the defense by showing that the defendant had been able to disarm the victim in the past by using the defendant's military training. Williams v. State, 298 Ga. App. 151, 679 S.E.2d 377 (2009).

Defendant's right to testify not violated. — Defendant's constitutional right to testify in the defendant's own behalf was not violated. The trial court established that the defendant knew that the defendant had the right to testify if the defendant wanted to but elected not to after consulting with defense counsel. Branford v. State, 299 Ga. App. 890, 685 S.E.2d 731 (2009).

9. Physical and Other Nontestimonial Evidence

Photographing baseball cap. — Defendant's due process rights were not violated when the trial court admitted into evidence photographs of a baseball cap defendant allegedly wore on the night of the crime because the lost cap was not constitutionally material, and as far as the state knew at the time the cap disappeared, the cap was more likely to be inculpatory of the defendant since there was no apparent reason for the police to think that the cap would tend to exonerate rather than further inculpate the defendant; there was also no evidence that the state acted in bad faith, and even if it was assumed that the state's handling of the cap indicated careless, shoddy, and unprofessional investigatory procedures, it did not indicate that the police in bad faith attempted to deny the defendant access to evidence that the police knew would be exculpatory. Johnson v. State, 289 Ga. 106, 709 S.E.2d 768 (2011).

Blood and urine sample admissible. — Admitting the results of blood and urine analysis into evidence in the defendant's felony murder trial did not violate U.S. Const., amend. V, Ga. Const. 1983, Art. I, Sec. I, Para. XVI, or former O.C.G.A. § 24-9-20(a) (see now O.C.G.A. § 24-5-506) because the removal of a substance from the body through a minor intrusion did not cause the defendant to be a witness against oneself within the meaning of the Fifth Amendment and similar provisions of Georgia law. Bowling v. State, 289 Ga. 881, 717 S.E.2d 190 (2011).

Failure to object to search warrant affidavit from which DNA obtained. — With regard to defendant's convictions for rape and other crimes, the trial court did not err by concluding that defendant's trial counsel was not ineffective for failing to object to a search warrant affidavit that led to the police obtaining a DNA swab from defendant, despite defendant's voluntary statement to the detectives being elicited in violation of Miranda and case law, as the search warrant could be predicated on defendant's voluntary but unlawfully obtained statements. Brown v. State, 292 Ga. App. 269, 663 S.E.2d 749 (2008).

Use of previous convictions. — In a defendant's prosecution for malice murder and armed robbery, the trial court did not err in failing to instruct the jury without request that the jurors limit the jurors' consideration of the defendant's prior convictions to the purpose of impeachment only under former O.C.G.A. § 24-9-84.1(a) (see now O.C.G.A. § 24-6-609) as information regarding the defendant's prior convictions was not obtained in violation of the defendant's constitutional rights against self-incrimination under U.S. Const., amend. V. Phillips v. State, 285 Ga. 213, 675 S.E.2d 1 (2009).

Sex offender registration requirement for illegal aliens. — As for defendant's argument that registering as a sex offender would have exposed the defendant to prosecution for reentry of a previously removed alien under 8 U.S.C. § 1326, the court found no Fifth Amendment violation because defendant could not show that anything the defendant would have been required to provide under Georgia's sex offender statute would have confronted the defendant with a substantial hazard of self-incrimination (there were no nationality, visa, or other immigration details required to be submitted); the cases defendant cited in support of defendant's Fifth Amendment argument were distinguishable because those cases imposed a disclosure requirement largely designed to discover involvement in criminal activities, and the Sex

Offender Registration Notification Act was not designed to uncover criminal behavior, but was instead intended to protect the public from sex offenders by tracking their interstate movement. United States v. Simon-Marcos, No. 09-11189, 2010 U.S. App. LEXIS 2319 (11th Cir. Feb. 2, 2010) (Unpublished).

Audiotape. — Defendant was not denied due process on the ground that the prosecution withheld an audiotape because the defendant did not show that the state, either purposefully or through oversight or neglect suppressed the audiotape, much less that any earlier notice of the existence of the audiotape would have actually benefitted the defendant or that any alleged delay deprived the defendant of a fair trial. Nations v. State, 290 Ga. 39, 717 S.E.2d 634 (2011).

Due Process

1. In General

Jurisdiction over nonresidents. Although South Carolina defendants met the requirements of Georgia's long-arm statute, O.C.G.A. § 9-10-91, the defendants did not deliberately engage in significant activities in Georgia and did not have fair warning that the defendants might be haled into court in Georgia simply by hiring Georgia lawyers to handle litigation that occurred in Massachusetts. Therefore, the defendants were not subject to suit in Georgia by a company that provided expert witness and consulting services to the defendant in the Massachusetts litigation. Schmidt v. JPS Indus., No. 1:09-CV-3584-JEC, 2011 U.S. Dist. LEXIS 35284 (N.D. Ga. Mar. 31, 2011).

At-will employee denied due process. — Because a terminated university registrar was an at-will employee, the registrar had no property interest in the registrar's job and no due process claim. Moreover, by appealing directly to an administrative law judge, the registrar was afforded a full and fair hearing, fulfilling state and federal due process requirements. Bd. of Regents of the Univ. Sys. of Ga. v. Hogan, 298 Ga. App. 454, 680 S.E.2d 518 (2009).

2. Vagueness and Other Issues with Statutes

Unconstitutionality of in personam forfeiture provision. — In personam forfeiture provision of the Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-7(m) provides for criminal in personam forfeiture prior to indictment or conviction, despite the labeling of such a proceeding by the Georgia legislature as being civil in nature and, because an in personam forfeiture defendant must accordingly be afforded all of the constitutional safeguards due a criminal defendant, Georgia's civil procedure rules, which § 16-14-7(m) expressly utilizes, are not adequate to protect an in personam forfeiture defendant's constitutional right. Therefore, § 16-14-7(m) is unconstitutional because the law deprives in personam forfeiture defendants of the safeguards of criminal procedure guaranteed by the United States and Georgia Constitutions. Cisco v. State, 285 Ga. 656, 680 S.E.2d 831 (2009).

Marijuana statute did not create mandatory presumption of guilt. — O.C.G.A. § 16-13-2(b) did not violate due process by creating a mandatory presumption of guilt. The court interpreted it, as it had before, to render it valid and to carry out the legislative intent of establishing that possession of an ounce or less of marijuana was a misdemeanor. In the Interest of D. H., 285 Ga. 51, 673 S.E.2d 191 (2009).

Trial court did not err in granting a city summary judgment in a lessee's declaratory judgment action seeking an order declaring that City of Forest Park, Ga., Ordinance § 9-8-45 was unconstitutional because the ordinance was sufficiently definite so that a person of ordinary intelligence need not guess at its meaning; although the lessee contended that the phrase "without limitation of the generality of the foregoing" opened the definition of "public sidewalk" to include any space that the city later wished to assert fell under the ordinance, the specification of parking spaces and other areas intended for public travel did not permit the interpretation the lessee contended. Braley v.

City of Forest Park, 286 Ga. 760, 692 S.E.2d 595 (2010).

Statute relating to prescription forms signed in blank not unconstitutionally vague as applied. — O.C.G.A. § 16-13-41(h) was not unconstitutionally vague as applied to a defendant, a physician, who was charged with violating O.C.G.A. § 16-13-42(a)(1) by improperly providing 33 signed prescription forms in blank to the defendant's nurse practitioner in violation of § 16-13-41(h) as that provision broadly included possession of a document by any person other than the one whose signature appeared thereon; thus, a physician's staff member could not be excluded. Raber v. State, 285 Ga. 251, 674 S.E.2d 884 (2009).

Registration of address change by convicted sex offender. — Trial court did not err in revoking a convicted sexual offender's probation for failing to register an address change when the offender moved into a motel because O.C.G.A. § 42-1-12 was not unconstitutionally vague in failing to define the term "temporary residence". The offender did not find the term "temporary residence" vague since the offender had reported changes of address at least four times, and under common understanding of the term, "temporary residence" was not unconstitutionally vague; nor does the statute's use of the term "temporary residence" in any way authorize and encourage arbitrary and discriminatory enforcement, but rather, § 42-1-12(a)(16) sets forth in considerable detail the information that must be reported by a sexual offender, and nothing in it encourages arbitrary and discriminatory enforcement. Dunn v. State, 286 Ga. 238, 686 S.E.2d 772 (2009).

Registration requirements for homeless sex offenders unconstitutionally vague. — Address registration requirement of O.C.G.A. § 42-1-12 is unconstitutional under the due process clause of the United States and Georgia constitutions on vagueness grounds as applied to homeless sex offenders who possess no street or route address for their residence. Santos v. State, 284 Ga. 514, 668 S.E.2d 676 (2008).

O.C.G.A. § 40-6-120 was unconstitutionally vague. — In light of the conflict in the language of O.C.G.A. § 40-6-120(a)(2), a person of common intelligence could not determine with reasonable definiteness that the statute prohibits the making of a left turn into the right lane of a multi-lane roadway. Accordingly, § 40-6-120(a)(2) is too vague to be enforced against a driver of a vehicle making a left turn into a multi-lane roadway that lacks official traffic-control devices directing the driver into which lane to turn and is, therefore, unconstitutional under the due process clauses of the Georgia and United States Constitutions. McNair v. State, 285 Ga. 514, 678 S.E.2d 69 (2009).

3. Pretrial Criminal Proceedings

Identification procedure not overly suggestive. — Photographic array was not impermissibly suggestive. The people in the lineup had facial features similar to the defendant's, and at least three had slanted eyes; the fact that the defendant's picture was smaller, lighter in color, grainier, and less focused and the fact the defendant's head was more tilted did not make the array impermissibly suggestive; and the defendant failed to explain how the "full-face" lineup conducted here (as opposed to a lineup obscuring all facial features other than the eyes) was impermissibly suggestive. Pinkins v. State, 300 Ga. App. 17, 684 S.E.2d 275 (2009).

Presence at bench conferences. — Defendant's right to be present was not violated due to the defendant's absence from 13 bench conferences as 12 conferences involved only legal arguments regarding objections and trial procedure, the defendant's absence from which did not violate the right to be present, and the defendant waived the right at the remaining conference by failing to voice any objection to the defendant's absence, either directly or through counsel. Heywood v. State, 292 Ga. 771, 743 S.E.2d 12 (2013).

4. Criminal Trials

The state did not violate a defendant's due process rights or suborn perjury by having a shooting victim testify at defendant's aggravated assault trial that defendant had shot the victim, even though the victim had

previously testified in another proceeding that another person had shot the victim, because there was no showing that the victim's trial testimony was untrue or that the state knew the testimony was untrue. Arnold v. State, 301 Ga. App. 714, 688 S.E.2d 656 (2009).

Delay in bringing indictment.

Trial court properly denied a defendant's motion to dismiss the indictments due to a speedy trial violation with regard to burglary and murder charges as the defendant's contentions regarding fading memories, alone, did not demonstrate prejudice to the defendant's defense and the record supported a finding that any delay was attributable to the ongoing investigation of the crime which, at times, was complicated by such things as recanted testimony by certain witnesses. Ultimately, the defendant failed to show that the delay was the result of a deliberate action by the state to gain a tactical advantage. Bunn v. State, 284 Ga. 410, 667 S.E.2d 605 (2008).

Ten-year delay. — Defendant's due process rights were not violated by the ten-year delay between trial and appeal because the errors the defendant allegedly would have raised on appeal were without merit. Whitaker v. State, 291 Ga. 139, 728 S.E.2d 209 (2012).

Presumption of vindictiveness did not apply. — When the defendant was convicted of aggravated assault, burglary, theft by taking, and carrying a concealed weapon, the trial court properly imposed a 111-year sentence of imprisonment, which was within the statutory limits and which was the maximum possible. The presumption of vindictiveness was absent when a trial court imposed a greater penalty after trial than the court would have after a guilty plea; furthermore, the trial court explained that the court imposed the sentence because the defendant's actions were life-threatening, because the jury convicted the defendant of entering the dwelling with intent to commit murder, because the defendant's actions against one victim, the defendant's parent, had escalated from the defendant's previous misdemeanor crimes against the parent, and because the defendant displayed no remorse. Townes v. State, 298 Ga. App. 185, 679 S.E.2d 772 (2009).

Increasing time served on remand. — On remand, it was error for the trial court to increase the amount of time the defendant was to serve and to threaten to increase the time once again if the defendant took another appeal. Due process required that vindictiveness play no part in the sentence a defendant received. Schlanger v. State, 297 Ga. App. 785, 678 S.E.2d 190 (2009), cert. denied, No. S09C1542, 2010 Ga. LEXIS 127 (Ga. 2010).

Curative instruction to jury to disregard testimony.

Superior court did not err in failing to dismiss the indictment on the ground that the delay in the defendant's arrest and indictment violated the defendant's rights to due process under the Fifth and Fourteenth Amendments and Ga. Const. 1983, Art. I, Sec. I, Para. I because neither actual prejudice nor deliberate adverse action on the part of the state had been shown; the defendant was not in custody during the period in question. Higgenbottom v. State, 290 Ga. 198, 719 S.E.2d 482 (2011).

5. Jury Selection

Juror beginning deliberations before close of evidence. — Trial court did not err in denying a defendant's motion for a mistrial based upon the allegation that one or more jurors had begun deliberating before the close of the evidence. While the record showed that at least one juror had begun thinking about the case, there was no evidence that any deliberation of the case had begun; moreover when the jury reentered the courtroom, the trial court gave a curative instruction. Boone v. State, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

6. Assistance of Counsel

Improper interrogation.

While non-custodial and custodial statements were properly admitted, as not vitiating the defendant's constitutional rights once defendant invoked the right to counsel, a subsequent interview initiated by police violated this right; as a result, cocaine seized through information obtained from the interview had to be suppressed as fruit of the poisonous tree.

Vergara v. State, 283 Ga. 175, 657 S.E.2d 863 (2008).

7. Discovery, Compulsory Process, and Suppression of Evidence

Exculpatory evidence delayed. Defendant's due process rights were not violated when the state crime lab lost a condom found 150 feet from the crime scene before the bodily fluids in the condom could be tested because the defendant failed to show both: (1) that it was apparent that the condom, which was found in a location frequented by prostitutes, would contain evidence of exculpatory value; and (2) that the state acted in bad faith in losing the condom, which occurred before the defendant was arrested and identified as a suspect. Sharp v. State, 286 Ga. 799, 692 S.E.2d 325 (2010).

Taped phone conversation admissible. — Because the defendant was not in police custody at the time of the defendant's secretly taped telephone conversation with a coconspirator, the defendant's Fifth Amendment rights were not implicated. Thorpe v. State, 285 Ga. 604, 678 S.E.2d 913 (2009).

8. Appeals and Habeas Corpus

Delay in motion for new trial. — Delay in resolving the defendant's motion for new trial did not violate defendant's right to due process because the defendant failed to offer the specific evidence required to show that the delay prejudiced the defendant's appeal or that the result of the appeal would have been different but for the delay; although the trial exhibits were not in the record, the defendant failed to explain how the absence of the trial exhibits impaired the defendant's ability to assert claims on appeal, while the defendant asserted that the defendant could have raised a challenge on appeal to the trial court's denial of the defendant's pre-trial motion for change of venue, the defendant failed to specify how the delay in proceedings harmed the defendant's ability to make such a claim, particularly given that voir dire was transcribed fully in the record, and the defendant made the bare assertion that it was impossible to investigate potential claims for ineffective assistance of trial counsel without identifying any reasonably viable ineffectiveness claims that could have been raised and without indicating whether any efforts had been made to contact trial counsel in that regard. Owens v. State, 286 Ga. 821, 693 S.E.2d 490, cert. denied, 131 S. Ct. 156, 178 L. Ed. 2d 93 (2010).

Taking of Private Property for Public Use

2. Compensable Takings

Impairment shared by general public.

Trial court properly granted summary judgment to a city in a property owner's inverse condemnation claim under U. S. Const., amend. V, arising from the city's requirement that an outstanding bill for water service on the property be paid prior to providing further water service as the city did not force the owner to bear a public burden which should have been borne by the public as a whole. Solid Equities, Inc. v. City of Atlanta, 308 Ga. App. 895, 710 S.E.2d 165 (2011).

Issuance of license for building a private dock not a taking for public use. — Landowners' takings claims, which turned on their allegation that their property was diminished in value by the Department of Natural Resource's issuance of a license to their neighbors to build a private dock, failed because such a license was not a taking of the owners' property by the state for public use: the license was granted to a private party for the lawful construction of a private dock. Hitch v. Vasarhelyi, 302 Ga. App. 381, 691 S.E.2d 286 (2010).

RESEARCH REFERENCES

ALR. — When does use of taser constitute violation of constitutional rights, 45 ALR6th 1.

[Amendment VI]

[Right to Speedy Trial, Witnesses, etc.]

Law reviews. — For article, "Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians are Nontestimonial and Admissible as an Exception to the Confrontation Clause," see 58 Mercer L. Rev. 569 (2007). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For survey article on death penalty law, see 60 Mercer L. Rev. 105 (2008). For survey article on domestic relations law, see 60 Mercer L. Rev. 121 (2008). For article, "Eleventh Circuit Survey: January 1, 2008 - December 31, 2008: Casenote: Shots, Shoes, and Self-Representation: Indiana v. Edwards and the New Limitation on the Sixth Amendment Right of Self-Representation," see 60 Mercer L. Rev. 1509 (2009). For article, "No Witness? No Admission: The Tale of Testimonial Statements and Melendez-Diaz v. Massachusetts," see 61 Mercer L. Rev. 683 (2010). For article, "Williams v. Illinois: Confronting Experts, Science, and the Constitution," see 64 Mercer L. Rev. 805 (2013).

For note, "Definitely Not Harmless: The Supreme Court Holds that the Erroneous Disqualification of Retained Counsel Warrants Automatic Reversal in United States v. Gonzalez-Lopez," see 58 Mercer L. Rev. 763 (2007). For note, "Testimonial? What the Heck Does That Mean?: Davis v. Washington," see 58 Mercer L. Rev. 1097 (2007). For note, "Vesting Title in a Murderer: Where is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in Levenson?," see 45 Ga. L. Rev. 877 (2011). For note, "Ineffective Assistance of Counsel Blues: Navigating the Muddy Waters of Georgia Law After 2010 State Supreme Court Decisions," see 45 Ga. L. Rev. 1199 (2011).

For comment, "Right to Counsel Denied: Corporate Criminal Prosecutions, Attorney Fee Agreements, and the Sixth Amendment," see 58 Emory L.J. 1265 (2009).

JUDICIAL DECISIONS

Analysis

General Consideration

Court required to make findings on Mandarin Chinese speaker's competency to stand trial without interpreter. — Trial court erred in denying a defendant's motion for new trial based on the defendant's contention that the defendant did not understand the proceedings because an interpreter was not provided to the defendant without making findings; there was sufficient evidence to raise a question as to whether the defendant, whose native language was Mandarin Chinese, was competent to be tried without an interpreter, and the trial court was required to make findings as to the defendant's competency on the record. Ling v. State, 288 Ga. 299, 702 S.E.2d 881 (2010).

Defendant's absence from courtroom during discussions about juror. — Defendant's constitutional rights were not violated when the defendant was allegedly absent from the courtroom when the attorneys were having a discussion with the trial judge about the possibility of replacing a juror because the trial court conducted the trial properly by making sure the defendant was present when necessary; the record did not mention the exact moment the defendant entered the courtroom between the time the trial court ordered the defendant to be brought into the courtroom and the time the recess was concluded, but the absence of that information did not prove that the defendant was not in the court room at the time discussions were had about the missing juror. Milinavicius v. State, 290 Ga. 374, 721 S.E.2d 843 (2012).

Indictments generally. — There is no right to a speedy indictment. Griffin v. State, 282 Ga. 215, 647 S.E.2d 36 (2007), overruled on other grounds, Garza v. State, 284 Ga. 696, 670 S.E.2d 73 (2008).

Defense counsel was not ineffective in stipulating to negative scientific test results because the test results were not inconsistent with the defendant's defense. Chance v. State, 291 Ga. 241, 728 S.E.2d 635 (2012).

Cited in Hung v. State, 282 Ga. 684, 653 S.E.2d 48 (2007); Stinski v. State, 286 Ga. 839, 691 S.E.2d 854 (2010); Lewis v. State, 291 Ga. 273, 731 S.E.2d 51 (2012).

Speedy and Public Trial

1. In General

Dead-docketing a case. — Placing a case upon the dead docket constitutes neither a dismissal nor a termination of the prosecution in the accused's favor. Consequently, the fact that a case is placed on the dead docket does not affect the constitutional right to a speedy trial. Hayes v. State, 298 Ga. App. 338, 680 S.E.2d 182 (2009).

Factors to be considered in speedy trial determinations.

Dismissal of an indictment on speedy trial grounds was in error, and remand was appropriate because the trial court erred in the court's key factual findings regarding the defendant's anxiety and concern and actual impairment to the defense and, additionally, the trial court attributed only eight months of delay to the State of Georgia, without addressing the reasons for the nearly eight additional years of delay, including a year of delay caused, apparently deliberately, when the defendant became a fugitive. Moreover, the trial court did not properly balance the factors so that the intermediate appellate court could not properly affirm the judgment. State v. Porter, 288 Ga. 524, 705 S.E.2d 636 (2011).

Order denying the defendant's speedy trial claim noted that the 14-month delay was presumptively prejudicial, but failed to address any of the other Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) factors; further, there was no evidence that a hearing was held. Therefore, remand was required for the trial court's entry of findings of fact and conclusions. McDougler v. State, 323 Ga. App. 828, 748 S.E.2d 475 (2013).

Delay measured from time of arrest.

As a defendant's motion for discharge and acquittal complained of a 15-month delay that occurred after the date that the defendant was arrested, a speedy trial analysis had to be conducted based on standards pursuant to U.S. Const., amend. VI. State v. Thaxton, 311 Ga. App. 260, 715 S.E.2d 480 (2011).

Delay due to mental health issues.

The trial court did not abuse its discre-

tion in granting the defendants' motions to dismiss the charges filed against them because the court was authorized to find that, as the result of the state's negligence, both of the defendants were subjected to an extraordinarily long delay in being brought to trial, that they were not dilatory in asserting their right to a speedy trial, and that, as a result of the delay, their ability to defend against the belated murder charge was prejudiced. State v. White, 282 Ga. 859, 655 S.E.2d 575 (2008).

Defendant's right to speedy trial, etc.

Defendant's speedy trial right under the Sixth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) were not violated when the defendant was arrested in 1998, indicted in 1999, and tried in 2004. Part of the delay was caused by the defendant's mistaken release; defense counsel shared responsibility for the delay; the defendant had not asserted the right to a speedy trial until the day before the commencement of the defendant's first trial; there was no oppressive pretrial incarceration because the defendant had been incarcerated for only four or five months; and the death of a witness was not prejudicial because the witness's identification of a person fleeing the crime scene as someone other than the defendant did not preclude the possibility that the defendant was the other person seen running from the scene and because counsel evidently regarded the deceased witness's observations as harmful to the defense. Smith v. State, 284 Ga. 17, 663 S.E.2d 142 (2008).

Four-year delay in bringing a defendant to trial did not violate the defendant's Sixth Amendment right to a speedy trial since: (1) the delay was due in part to both sides' interlocutory appeals; (2) the state did not deliberately delay the trial to hamper the defense; (3) the defendant waited until less than three weeks before trial to assert the speedy trial claims; and (4) the testimony of two witnesses who died before the trial would have been more favorable to the state than to the defendant, and the state agreed to stipulate to the witnesses' testimony. Layman v. State, 284 Ga. 83, 663 S.E.2d 169 (2008).

There was no violation of the defendant's constitutional speedy trial rights under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), as a delay in bringing defendant to trial due to a backlog in the court system was not shown to have caused any prejudice to the defendant, and the defendant failed to timely assert the right to a speedy trial. Thomas v. State, 296 Ga. App. 231, 674 S.E.2d 96 (2009).

Defendant's constitutional speedy trial right was not violated by delays ranging from two to five years. The primary reason for the delay was the defendant's cooperation in another inmate's case, to which the defendant agreed; the defendant waited several years to assert the speedy trial right; and there was no prejudice to the defendant, who was already serving a lengthy federal prison sentence. Marshall v. State, 286 Ga. 446, 689 S.E.2d 283 (2010).

Three and a half year delay in bringing a capital case to trial was not caused solely by the state. Although funding ran out to pay the defendant's preferred attorneys, there were experienced public defenders available; the defendant's refusal to cooperate with the public defenders impeded the case, as did the defendant's preferred counsel's attempts to be reassigned to the case when they knew there was no money to pay them. Weis v. State, 287 Ga. 46, 694 S.E.2d 350, cert. denied, 131 S. Ct. 100, 178 L. Ed. 2d 63 (2010).

Although there was a presumption of prejudice due to the four-year delay with respect to a defendant's speedy trial rights under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), there was no violation thereof upon analysis of the four factors; the reason for the delay was due to the defendant's counsel, the defendant did not file a timely demand for a speedy trial, and the defendant did not show prejudice. Brewington v. State, 288 Ga. 520, 705 S.E.2d 660 (2011).

As two defendants' speedy trial time from the date of the defendants' mistrial through to the date the defendants' second dismissal motion was denied was only a little over three months, there was no presumption of prejudice and the defendants' speedy trial rights were not violated under U.S. Const., amend. VI and

Ga. Const. 1983, Art. I, Sec. 1, Para. XI(a). Brewington v. State, 288 Ga. 520, 705 S.E.2d 660 (2011).

There was no abuse of the superior court's discretion in denying the defendant's motion to dismiss based on alleged violations of the defendant's constitutional rights to a speedy trial because the superior court expressly found that there was no evidence that the delay was the result of any intentional or deliberate action by the state to hamper the defense and that once the case appeared on a trial calendar, the defendant lengthened the delay by seeking and obtaining a continuance; even if the state's failure to explain with specificity the state's role in the delay so as to result in a finding of negligence, when a delay was caused by the mere negligence of the state, that was relatively benign, and therefore, that factor had to be weighed only slightly against the state. Higgenbottom v. State, 290 Ga. 198, 719 S.E.2d 482 (2011).

Defendant's right to a speedy trial was not violated because at most the delay could be attributed to negligence on the part of the state, which was generally considered to be relatively benign; the state did not deliberately attempt to delay trial in order to hamper the defendant's defense or to gain a tactical advantage. Williams v. State, 290 Ga. 24, 717 S.E.2d 640 (2011).

13-month delay. — Trial court properly denied a murder defendant's motion to dismiss an indictment on speedy trial grounds. Although the court found that the 13-month delay was caused by the state's negligence, the court also found that the defendant had not timely asserted the defendant's speedy trial right and that the defendant had not shown that the delay impaired the defense. Hassel v. State, 284 Ga. 861, 672 S.E.2d 627 (2009).

23-month delay presumptively prejudicial. — Pursuant to U.S. Const., amend. VI, a delay from the defendant's arrest until the grant of the defendant's speedy trial motion was approximately 23 and a half months, such that it was presumptively prejudicial, which triggered the application of the Barker balancing test. State v. Thaxton, 311 Ga. App. 260, 715 S.E.2d 480 (2011).

28-month delay. — Defendant's late assertion of defendant's constitutional right to a speedy trial weighed heavily against the defendant as did the defendant's failure to show prejudice from the 28-month delay, which was not attributable to any improper motive by the state as an investigator died and the prosecutor had 10 weeks' maternity leave; thus, defendant's motion to dismiss was properly denied. Ferguson v. State, 303 Ga. App. 341, 693 S.E.2d 578 (2010).

32-month delay. — With regard to charges of aggravated child molestation, child molestation, and rape, a trial court did not err in denying a defendant's motion for discharge and acquittal since although the 32 month passage of time between the defendant's arrest and the filing of the motion for discharge was presumed prejudicial and more than half of the delay was attributable to the state, the defendant waited 32 months to file the motion and failed to show any prejudice arising from the delay. The defendant failed to explain what physical evidence was affected by the passage of time and merely made a generalized statement that memories fade over time. Wofford v. State, 299 Ga. App. 129, 682 S.E.2d 125 (2009).

45-month delay presumptively prejudicial. — For purposes of U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), a delay of three years and nine months from the date of the defendant's arrest and the date of the defendant's scheduled trial was presumptively prejudicial. State v. Reid, 298 Ga. App. 235, 679 S.E.2d 802 (2009).

54-month delay. — Trial court erred by denying a defendant's motion to dismiss the indictment on speedy trial grounds, which charged the defendant with the crimes of aggravated assault, aggravated battery, and cruelty to children, as the 54-month delay at issue was substantial and longer than delays that the Georgia Supreme Court has described as egregious and deplorable; the evidence showed that the delay resulted from a deliberate, strategic decision by the state since the state chose to dead-docket the case; and the defendant asserted the right to a speedy trial in due course. The trial court erred in several respects in the court's legal anal-

ysis of the defendant's constitutional speedy trial claim, namely: by failing to weigh the length of the delay as part of the court's balancing analysis and by failing to adequately address the reasons for that delay; by abusing the court's discretion in finding that the defendant's three-to-four month delay in asserting the right to a speedy trial should be weighed against the defendant; and by finding that the defendant was required to present additional evidence of actual prejudice caused by the state's conduct. Hayes v. State, 298 Ga. App. 338, 680 S.E.2d 182 (2009).

Nine-year delay. — Trial court did not abuse the court's discretion when the court denied the defendant's claim that the defendant's constitutional right to a speedy trial was violated because neither the defendant nor the defendant's initial attorney made themselves aware of the actual status of the case between 1998 and 2005, and the defendant failed to keep the defendant's address up to date with the trial court such that the court was unable to send the notice for the arraignment to the defendant's home address; the defendant never made a speedy trial demand during the nine years that passed between the arrest and trial, the defendant was not subjected to oppressive pre-trial incarceration and did not suffer any unusual anxiety or concern because the defendant was not actually incarcerated for most of the nine years in question, and the defendant also was not prejudiced by lost evidence. Rafi v. State, 289 Ga. 716, 715 S.E.2d 113 (2011).

Failure to consider entire time of delay. — Trial court abused the court's discretion in denying the defendant's plea in bar because the trial court considered only 19 of the 55 months of delay between the defendant's arrest and the denial of the defendant's plea in bar, with the result that the court could not properly exercise the court's discretion as to whether the defendant's constitutional right to a speedy trial was violated. Singleton v. State, 317 Ga. App. 637, 732 S.E.2d 312 (2012).

Partial closure of courtroom. — Trial court did not abuse the court's discretion by partially closing the courtroom during the victims' testimonies because the trial court limited the closure by allowing the defendant, the attorneys for the defense and the state, immediate families or guardians of the victims, immediate families or guardians of the defendant, the attorneys' employees, officers of the court, sheriff's deputies, and any members of the press to remain in the courtroom, which was acceptable pursuant to the Sixth Amendment. Pate v. State, 315 Ga. App. 205, 726 S.E.2d 691 (2012), cert. denied, No. S12C1308, 2012 Ga. LEXIS 1027 (Ga. 2012).

Exclusion of certain persons from courtroom.

When a defendant claimed that the defendant's Sixth Amendment right to a public trial had been violated by the exclusion of the defendant's family from the courtroom during voir dire, the trial court was authorized to weigh the credibility of witnesses and to find as fact that bailiffs and court officials did not bar the defendant's family from the courtroom at that time. Moreover, the defendant had waived the issue by not bringing the matter to the trial court's attention when the defendant learned of it, which was before the jury was struck, thereby foreclosing the trial court's ability to rectify the matter with a new jury pool or in any other way. Craven v. State, 292 Ga. App. 592, 664 S.E.2d 921 (2008), cert. denied, 2008 Ga. LEXIS 935 (Ga. 2008).

Right to public trial denied when trial held in county jail. — Defendant was denied the right to a public trial under the Sixth Amendment of the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) when the defendant's trial was held in a county jail because the produced unrebutted evidence that jail authorities excluded from the jail courtroom the defendant's brother, a member of the public who wanted to attend the trial; the closure of the courtroom to the brother was neither brief nor trivial as the brother was kept out of the courtroom during the entire trial, which involved criminal charges brought against the defendant in regard to a family member, and the trial court, by deciding to hold the defendant's trial in a facility where the public's access was governed exclusively by the jail authorities, failed in the

court's obligation to take reasonable measures to accommodate public attendance at the trial. Purvis v. State, 288 Ga. 865, 708 S.E.2d 283 (2011).

Right to public trial not denied by temporary closing of courtroom for child victim's testimony. — In a child molestation case, the trial court did not deny the defendant the Sixth Amendment right to a public trial when the court cleared the courtroom for the testimony of the 17-year-old victim in light of the victim's fragile emotional and psychological history and the fact that the courtroom was immediately reopened after the victim testified. Mullis v. State, 292 Ga. App. 218, 664 S.E.2d 271 (2008).

By failing to challenge the constitutionality of O.C.G.A. § 17-8-54 until after the child victim testified, the defendant waived the right to argue on appeal that the statute violated the defendant's constitutional right to a public trial. Craven v. State, 292 Ga. App. 592, 664 S.E.2d 921 (2008), cert. denied, 2008 Ga. LEXIS 935 (Ga. 2008).

Ineffective assistance based on unforeseen damaging testimony. — Trial counsel was not ineffective for failing to challenge the decision of the codefendant's to call a witness because trial counsel made a strategic decision, based on a pre-trial investigation, not to challenge the codefendant's decision to call the witness; the fact that the witness gave unforeseen damaging testimony did not justify an after the fact adjudication of deficient performance. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661 (2012).

3. Burden of Requesting and Providing Speedy Trial

Assertion of right is a consideration in determining violation of right to speedy trial.

Although a pretrial delay of over five years in a child molestation case was uncommonly long and was mostly attributable to the negligence of the state, the defendant's failure to file a statutory demand for speedy trial and the delay of five years, and 21 calendar calls, in asserting the defendant's right weighed heavily against the defendant. Denial of the defendant's motion to dismiss the indictment was proper. Stewart v. State, 310 Ga. App. 551, 713 S.E.2d 708 (2011).

Although defendant has no duty to bring the case to trial, etc.

Trial court erred in declining to find a defendant's failure to assert the speedy trial right weighed against the defendant as the defendant was represented by counsel. State v. Thaxton, 311 Ga. App. 260, 715 S.E.2d 480 (2011).

Error in applying the speedy trial test. — Trial court erred in granting defendant's motion to dismiss the indictment on speedy trial grounds as the trial court miscalculated the length of the delay; improperly considered the state's pre-indictment, pre-arrest inaction for purposes of evaluating the reasons for the delay; failed to weigh the defendant's assertions of the right to speedy trial; and erred in finding that the defense was substantially impaired by the death of the defendant's sister. State v. Gay, 321 Ga. App. 92, 741 S.E.2d 217 (2013).

Insufficient evidence to show denial of speedy trial.

That a defendant never asserted a statutory right to a speedy trial, agreed to some continuances, never objected to others, and never acted on the trial court's invitation to file an out-of-time speedy trial demand, established that the defendant did not timely and vigilantly assert the defendant's constitutional right to a speedy trial. Therefore, the defendant's motion to dismiss on speedy trial grounds was properly denied. Bowling v. State, 285 Ga. 43, 673 S.E.2d 194 (2009).

There was no abuse of the superior court's discretion in denying the defendant's motion to dismiss based on alleged violations of the defendant's constitutional rights to a speedy trial because the defendant did not make an unusual showing of anxiety and concern, which were always present to some extent during the pendency of a criminal prosecution. Higgenbottom v. State, 290 Ga. 198, 719 S.E.2d 482 (2011).

4. Prejudice from Delay

Death of a witness impacting speedy trial rights. — There was no abuse of the superior court's discretion in denying the defendant's motion to dismiss

based on alleged violations of the defendant's constitutional right to a speedy trial because the defendant failed to show that the superior court was in error in finding that the defendant made no showing of actual prejudice to the defense due to the death of the doctor who performed the autopsy on the victim; any impact on the case by the doctor's death existed prior to the attachment of the defendant's constitutional rights to a speedy trial, and the state was willing to stipulate to the admission of the doctor's autopsy report. Higgenbottom v. State, 290 Ga. 198, 719 S.E.2d 482 (2011).

Prejudice must be shown.

Claim that defense counsel was ineffective for failing to prevent a letter written by a jailhouse informant from going into the jury room during deliberations failed because the defendant failed to show that there was a reasonable probability that the outcome of the trial would have been different since the contents of the letter were not particularly harmful to the defendant. Young v. State, 292 Ga. 443, 738 S.E.2d 575 (2013).

Even assuming counsel's failure to object to testimony that a photo lineup made up of photos of persons who had been arrested constituted deficient performance, the defendant failed to show prejudice because there was other testimony of the defendant's bad character admitted without objection. Thornton v. State, 292 Ga. 796, 741 S.E.2d 641 (2013).

Pretermitting whether trial counsel was deficient for failing to object to a question propounded by the prosecutor in which the defendant contended the prosecutor stated the prosecutor's opinion of the defendant's guilt, because an objection to the prosecutor's question as posed would not have changed the outcome of the case given the substantial evidence of the defendant's guilt, the defendant's ineffective assistance of counsel claim was without merit. Thompson v. State, 294 Ga. 693, 755 S.E.2d 713 (2014).

Delay of twelve months and ten days. — Trial court did not err when the court denied the defendant's motion to dismiss based on a purported violation of defendant's constitutional right to a speedy trial because the circumstances of the case warranted a finding that the twelve-month, ten-day delay between the defendant's indictment and the filing of defendant's motion to dismiss was not presumptively prejudicial. The defendant was serving a sentence on an unrelated charge in Mississippi when the indictment was returned, a requisition warrant had to be obtained from the Mississippi governor, which process was initiated within a month of the defendant's indictment and took three months before the warrant was issued, and the defendant was brought to Georgia two months after the warrant issued and was arraigned approximately two months later. Rogers v. State, 286 Ga. 387, 688 S.E.2d 344 (2010).

Three year delay. — There was no speedy trial violation under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a). Although the delay of over three years was presumptively prejudicial, it was primarily attributable to the defendant; the defendant delayed in asserting the constitutional right to a speedy trial; and the defendant's generalized statements, along with the fact that the record did not show that trial counsel attempted to locate the physician who examined the victim, did not suffice to show prejudice. Robinson v. State, 298 Ga. App. 164, 679 S.E.2d 383 (2009).

40-month delay was not prejudicial. — In a defendant's motion for acquittal based upon a speedy trial violation under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), although the delay of 40 months raised a presumption of prejudice, no evidence supported defendant's claim of anxiety and concern over the charges nor the defendant's claims that the defendant was unable to produce two witnesses who would have provided information material to the defendant's defense. In the absence of prejudice, the defendant's motion for acquittal was properly denied. Lynch v. State, 300 Ga. App. 723, 686 S.E.2d 268 (2009).

Four year delay. — State's four-year delay in bringing a cocaine trafficking case against the defendant violated a defendant's constitutional speedy trial right. The state's investigation was complete at the time of the indictment, and the trial court found that the state delayed the

trial to gain a tactical advantage and to harass the defendant. State v. Shirley, 311 Ga. App. 141, 714 S.E.2d 636 (2011).

Five year delay. — Court of appeals erred in determining, apparently from the court's own review of the record, that the speedy trial factor of whether, in due course, the defendant asserted his or her right to a speedy trial would be weighed against the defendant based on the more than five year delay from the defendant's arrest to the defendant's assertion of the right; a delay of over five years typically would warrant the speedy trial factor of whether, in due course, the defendant asserted his or her right to a speedy trial being weighed heavily against the defendant, and if the factor is to be weighed differently based on the particular circumstances of the case, that exercise of discretion is committed to the trial court, not the appellate courts. State v. Pickett, 288 Ga. 674, 706 S.E.2d 561 (2011).

Where reason for five and one-half year delay in trial, etc.

Presumptive prejudice that arose from a delay of over five years in a defendant's trial was insufficient for the defendant to prevail on a Sixth Amendment speedy trial claim, and the denial of the defendant's motion to dismiss was proper because there was no demonstrable prejudice to the defense and the defendant was dilatory in asserting the right to a speedy trial. Harris v. State, 284 Ga. 455, 667 S.E.2d 361 (2008).

Ten year delay between trial and appeal. — Defendant's due process rights were not violated by the ten-year delay between trial and appeal because the errors the defendant allegedly would have raised on appeal were without merit. Whitaker v. State, 291 Ga. 139, 728 S.E.2d 209 (2012).

Two year delay not prejudicial. — Trial court did not abuse the court's discretion when the court denied the second defendant's motion to dismiss on constitutional speedy trial grounds because although the two-year delay was presumptively prejudicial, the majority of the delay was due to the circumstances of the case, the second defendant's two-year delay in asserting the defendant's right to a speedy trial weighed heavily against the defendant, and the defendant offered no specific evidence of any prejudice to the defendant's defense resulting from the delay. Brown v. State, 287 Ga. 892, 700 S.E.2d 407 (2010).

Delay of more than two years. — With regard to a defendant being indicted for malice murder and other crimes, the trial court did not abuse the court's discretion by denying the defendant's motion to dismiss the indictment on speedy trial grounds as, although the delay of two years, two months, and 23 days in bringing the defendant to trial was presumptively prejudicial, the record supported the trial court's factual conclusion that the defendant failed to establish oppressive pretrial incarceration or anxiety and concern beyond that which necessarily attended confinement in a penal institution, and the defendant failed to present any specific evidence that the defendant's ability to defend had been impaired. Ruffin v. State, 284 Ga. 52, 663 S.E.2d 189 (2008), cert. denied, 555 U.S. 1181, 129 S. Ct. 1330, 173 L.Ed.2d 603 (2009).

Three year and nine month delay. — Defendant's indictment for armed robbery was properly dismissed on speedy trial grounds after a delay of three years and nine months because the defendant's ability to prepare defendant's defense was impaired by lost hospital records, missing 9-1-1 calls, and other missing evidence. State v. Ivory, 304 Ga. App. 859, 698 S.E.2d 340 (2010).

Five year delay not prejudicial. — Trial court did not abuse its discretion in finding that a defendant failed to show a constitutional violation of the defendant's right to a speedy trial and by denying the defendant's motion for discharge and acquittal with regard to the defendant's convictions for sexual assault as the defendant never filed a speedy trial demand; there was no evidence nor finding by the trial court that the state intentionally delayed the trial to impair the defendant's defense; the defendant's failure to assert either a statutory or constitutional right to a speedy trial was entitled to strong evidentiary weight against the defendant; and the fact that the defendant never filed a speedy trial demand suggested that the defendant was not suffering anxiety or

stress from the delay. The reviewing court noted that the five year delay in bringing the defendant to trial was solely based on requests from defense counsel due to illness, death in the family, or death of an expert witness. Disharoon v. State, 288 Ga. App. 1, 652 S.E.2d 902 (2007).

Delay attributable to hiring four different counsel.

Trial court did not abuse the court's discretion in denying the defendant's motion to dismiss an indictment on constitutional speedy trial grounds because the court applied the proper framework for analyzing the speedy trial issue, and the evidence supported the trial court's findings that the two years prior to indictment were used for investigation and that the defendant did not experience any unusual anxiety and concern beyond that which necessarily accompanied serious pending charges; the trial court's finding of no oppressive pretrial incarceration was correct because the defendant was released on bond less than three weeks after the defendant's arrest, and the delay, though long, was reasonable under the circumstances and in light of the scientific evidence involved. Sweatman v. State, 287 Ga. 872, 700 S.E.2d 579 (2010).

Reason for delay.

Trial court properly denied defendant's motion to dismiss the indictment against him because defendant never filed an effective statutory demand for a speedy trial and, as to defendant's constitutional right to a speedy trial, the 68-month delay was presumed prejudicial, but defendant prolonged the proceedings due to defendant's own issues with retaining counsel, including defendant's original counsel obtaining various leaves of absences due to illness and defendant's unsuccessful efforts to retain other private counsel. Henderson v. State, 290 Ga. App. 427, 662 S.E.2d 652 (2008).

Prejudice not shown.

Trial court did not err by denying a defendant's motion to dismiss based on an alleged violation of the defendant's constitutional right to a speedy trial because the various appeals by the defendant and the state constituted valid reasons for significant periods of delay in the trial, part of the delay was inherent since the case involved a death penalty prosecution, there was no evidence of a deliberate attempt by the state to delay the trial in order to hamper the defense, and the trial court was authorized to conclude that there had not been any impairment to the defense. Griffin v. State, 282 Ga. 215, 647 S.E.2d 36 (2007), overruled on other grounds, Garza v. State, 284 Ga. 696, 670 S.E.2d 73 (2008).

Three defendants failed to carry the burden of establishing that a 14-month delay in bringing defendants to trial was presumptively prejudicial and, therefore, violated defendants' right to a speedy trial, because the peculiar circumstances of the case authorized a finding that the case was being prosecuted with the promptness customary for a complex drug trafficking case involving multiple defendants. Defendants failed to show that such a delay was presumptively prejudicial under the circumstances of the case: (1) the case was more akin to a complex conspiracy charge, as opposed to an ordinary street crime, since the indictment charged 11 people with the serious offense of trafficking in cocaine; (2) defendants acknowledged in the trial court and in appellate briefs that there was a massive amount of evidence for discovery, including thousands of documents, thousands of telephone records, and hundreds of hours of taped conversations; and (3) there was a also a federal investigation of the drug operation going on at the same time as the state investigation. Lawrence v. State, 289 Ga. App. 698, 658 S.E.2d 144 (2008), cert. denied, No. S08C1086, No. S08C1084, 2008 Ga. LEXIS 467, 486, 512 (Ga. 2008).

With regard to defendant's convictions for theft by taking and on two counts of violation of oath by a public officer, the trial court properly denied defendant's motion to dismiss based on a violation of defendant's constitutional right to a speedy trial as no violation was established since some delay was attributable to defendant and defendant never filed a statutory demand for a speedy trial; defendant did not show any evidence that the state deliberately delayed the trial in order to hamper the defense; and defendant did not show that the delay impaired the defense. Brandeburg v. State, 292 Ga.

App. 191, 663 S.E.2d 844 (2008), cert. denied, 2008 Ga. LEXIS 921 (Ga. 2008).

Nine-month delay between a defendant's indictment for murder and the defendant's filing of a motion to dismiss the indictment on constitutional grounds was not a speedy trial violation under the Sixth Amendment as the defendant filed no demand for a speedy trial under O.C.G.A. § 17-7-171; did not raise the speedy trial issue for nine months; was imprisoned on other charges during those nine months; and showed no prejudice from the delay. Jones v. State, 284 Ga. 320, 667 S.E.2d 49 (2008).

Defendant's motion to dismiss an indictment based on a violation of the defendant's constitutional right to a speedy trial was properly denied as the defendant failed to show prejudice. There was no evidence that the defendant was subjected to substandard conditions in jail before release on bond, and the defendant failed to make any real showing of harm to the defense due to alleged changes in a defense witness's testimony and the destruction of certain physical evidence. Bowling v. State, 285 Ga. 43, 673 S.E.2d 194 (2009).

A defendant's constitutional right to a speedy trial was not violated despite a 26-month delay between the defendant's arrest and the filing of a motion to dismiss the indictment for aggravated battery and aggravated assault, because the defendant did not assert the speedy trial right for 26 months, was free on bond the whole time, and showed no prejudice from the delay, despite the razing of the crime scene. Williams v. State, 300 Ga. App. 797, 686 S.E.2d 407 (2009).

Trial court did not abuse the court's discretion by concluding that the presumption of prejudice arising from any delay in bringing the defendant to trial was insufficient for the defendant to prevail on the defendant's speedy trial claim because the defendant never filed a statutory speedy trial demand and only raised the speedy trial issue in defendant's October 24, 2008 motion to dismiss the indictment, and the defendant did not show anything oppressive relating to the defendant's pretrial incarceration or release on bond; there is no abuse of discretion in the trial court's determination that there was no prejudice caused by the unavailability of witnesses after the trial court specifically found that the witnesses' recorded sworn testimony from the first trial is still available, and there was a thorough and sifting cross-examination done at the first trial. Jakupovic v. State, 287 Ga. 205, 695 S.E.2d 247 (2010).

Trial court did not abuse the court's discretion when the court denied the first defendant's motion to dismiss the indictment on speedy trial grounds when although the delay in the instant case triggered a threshold finding of presumptive prejudice, while the final few weeks of delay could have been avoided had the state alerted the court to the fact that the victim was subject to a federal subpoena in Florida, the state did not deliberately attempt to hamper the defense in that regard. Moreover, the first defendant waited more than three years after the defendant's arrest to assert the defendant's demand, and the first defendant's alibi defense was not impaired as a result of the delay because defendant's alleged alibi witness was still available and capable of giving testimony. Brown v. State, 287 Ga. 892, 700 S.E.2d 407 (2010).

Although defendant contended the trial court should have dismissed the charges against the defendant because the defendant was denied the defendant's constitutional right to a speedy trial under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI, the record revealed no basis for granting such a motion because the record showed that any delay in bringing the case to trial was primarily attributable to defendant and that any resulting prejudice worked to the defendant's benefit, factors which weighed against defendant and defeated any contention that the defendant was deprived of the defendant's constitutional right to a speedy trial. Zeger v. State, 306 Ga. App. 474, 702 S.E.2d 474 (2010).

Prejudice shown.

Renewed motion for discharge and acquittal by the defendant was properly granted upon a determination that the defendant's constitutional speedy trial rights were violated under U.S. Const., amend. VI and Ga. Const. 1983, Art. I,

Sec. I, Para. XI, as the delay of almost four years in bringing the defendant to trial was presumptively prejudicial, and the remaining Barker-Doggett factors weighed in the defendant's favor; only a small portion of the delay was attributable to the defendant and the defendant timely asserted the right to a speedy trial. State v. Reid, 298 Ga. App. 235, 679 S.E.2d 802 (2009).

Defendant was denied defendant's constitutional right to a speedy trial and to due process based on the state's intentional act of trading discovery responses for a speedy trial right, and the resulting prejudice from the disappearance of a material witness. The trial court therefore abused the court's discretion in denying the defendant's motion for discharge and acquittal. Ditman v. State, 301 Ga. App. 187, 687 S.E.2d 155 (2009), cert. denied, No. S10C0539, 2010 Ga. LEXIS 243 (Ga. 2010).

Trial court abused the court's discretion by concluding that the defendant did not show sufficient prejudice from the delay to support a constitutional speedy trial claim because 33 months of a 35-month delay in trial was attributable to the state, and because the defendant established that during the delay witnesses with material testimony had become unavailable by leaving the country. Davis v. State, 301 Ga. App. 155, 687 S.E.2d 180 (2009).

Speedy trial rights were violated when the defendant was brought to trial more than 53 months after being indicted, an uncommonly long delay that weighed against the state. The delay occasioned by the prosecuting attorney's announcement that the state intended to seek the death penalty, made on the day the case was set for trial for the tenth time, weighed more heavily against the state; while the defendant did not assert the right to a speedy trial until almost four years after the indictment, the defendant's late assertion was somewhat mitigated by the defendant's repeated insistence that the state comply with the state's discovery obligations; and the defendant suffered actual prejudice as a result of the defendant's inability to show the extent to which evidence tampering occurred, due to an officer's inability to recall important details of the investigation. State v. Buckner, 292 Ga. 390, 738 S.E.2d 65 (2013).

Trial by Jury

1. In General

Personal waiver of jury trial.

A trial court did not err by finding that defendant made a personal, knowing, and intelligent waiver of the right to a jury trial with regard to defendant's convictions for aggravated child molestation and two counts of child molestation after a bench trial because, before trial began, defense counsel stated that defendant wished to waive the jury trial right and proceed with a bench trial, and the trial court questioned defendant, who confirmed that defendant wanted a bench trial and that defendant understood the choice. Further, at the hearing on defendant's motion for a new trial, defendant testified that defendant discussed the matter at length with defense counsel before trial and stated that defendant wanted the judge, not a jury, to decide defendant's fate. Brumbelow v. State, 289 Ga. App. 520, 657 S.E.2d 603 (2008).

Defendant did not knowingly, intelligently, and voluntarily waive jury trial. — Upon a withdrawal of opposition by the state, because an inmate was not advised of the constitutional right to a jury trial, and the court could find no extrinsic evidence in the record to conclude that the inmate knowingly, intelligently, and voluntarily waived the right to a jury trial on the state drug charges at issue, an order denying habeas relief was reversed, and the case was remanded. Sutton v. Sanders, 283 Ga. 28, 656 S.E.2d 796 (2008).

2. Selection of Jurors

Unified Appeal Procedure ensuring fair cross section. — Unified Appeal Procedure provides a statewide procedure for creating and evaluating jury source lists, and that method was designed to promote adequate representation of cognizable groups through the use of a comprehensive and objective standard. Although in some instances, that procedure may create temporary, self-rectifying anomalies as Decennial Census reports grow old,

the ill done by those temporary anomalies is outweighed by the other benefits of the procedure. Thus, a continued adherence to the requirements of the Unified Appeal Procedure regarding the balancing of cognizable groups to match the most-recent Decennial Census is justified by a sufficiently-significant state interest. Finally, a fair cross-section is also guaranteed by O.C.G.A. § 15-12-40 under standards "comparable if not identical" to Sixth Amendment standards. Williams v. State, 287 Ga. 735, 699 S.E.2d 25 (2010).

Failure to show actual under-representation of a claimed cognizable group.

Defendant's argument that Hispanic persons were misrepresented in the composition of the grand and traverse jury pools in violation of the Sixth and Fourteenth Amendments and O.C.G.A. § 15-12-40 was rejected because the defendant failed to show any actual misrepresentation of this group: defendant's own expert witness testified that when using 2000 Census data, absolute disparity figures for Hispanics were under the five percent threshold, although when adjusted to account for the citizenship rate of Hispanic persons, the absolute disparity figure showed over-representation by 6.12 percent for the grand jury list. Thus, the absolute disparity figures were well within constitutional requirements of 10 percent. Foster v. State, 288 Ga. 98, 701 S.E.2d 189 (2010).

Exclusion of women.

Trial court did not abuse the court's discretion in ruling that the defendant failed to establish a prima facie case of discriminatory purpose based on gender by the prosecution using seven of the prosecution's eight peremptory strikes against women. Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Right to conduct private voir dire on sensitive issues. — Defendant's right to a public trial was not violated by the trial court's conduct of certain portions of voir dire in a private jury room rather than in open court because the defendant's counsel agreed that jurors should have a private opportunity to answer questions of a sensitive nature, including jurors' attitudes toward homosexuality and jurors' prior arrests, and the right to a public trial gave way to the right for a fair trial. State v. Abernathy, 289 Ga. 603, 715 S.E.2d 48 (2011).

Jurors properly excused. — Trial court did not err by refusing to excuse jurors who indicated that they were conscientiously opposed to the death penalty for various reasons or had difficulty hearing or understanding the proceedings. Rice v. State, 292 Ga. 191, 733 S.E.2d 755 (2012).

Use of peremptory strikes to exclude blacks.

Trial court did not abuse the court's discretion in ruling that the defendant failed to establish a case of unconstitutional race-based discrimination by the prosecution using three of the prosecution's eight peremptory strikes against African-Americans. The reasons offered for the three strikes were race neutral and not pretextual. Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Ill defendant during voir defendant and subsequent waiver of rights. — Trial court did not abuse the court's discretion by denying a defendant's motion for a new trial based on the defendant vomiting in front of the jury during voir dire when the trial was commenced after a two day delay that was granted to the defendant after indicating an illness prevented the defendant's presence at trial. The trial court properly found that the alleged ill defendant waived the right to be present by repeatedly delaying the start of trial with the malingering conduct and by failing to object when defense counsel, in the defendant's presence, specifically requested that the trial court remove the defendant from the courtroom before bringing the jury panel back. Smith v. State, 284 Ga. 599, 669 S.E.2d 98 (2008).

Right to public trial not denied when jurors questioned in chambers in presence of defendant and counsel. — Defendant's Sixth Amendment right to a public trial was not violated when a number of potential jurors were questioned privately in chambers during voir dire because the potential jurors were questioned in the presence of the defendant and defense counsel. Johnson v. State, 293 Ga. 641, 748 S.E.2d 896 (2013).

Standard of review of trial courts' rulings.

Although defendant contended that defendant's Sixth Amendment right to trial by an impartial jury was violated, to establish a denial of the defendant's right to an impartial jury, a defendant had to show either actual juror partiality or circumstances inherently prejudicial to that right. Such a showing could not be made by speculation, and the record reflected that voir dire was not transcribed because there were no objections and no motions; therefore, defendant waived the right to complain on appeal about any purported irregularity during voir dire. Bynum v. State, 300 Ga. App. 163, 684 S.E.2d 330 (2009), cert. denied, No. S10C0225, 2010 Ga. LEXIS 300 (Ga. 2010).

Trial counsel did not render ineffective assistance by failing to raise a Batson challenge because the defendant failed to show that a Batson challenge would have been successful since the defendant neither called the state's prosecutors to testify at the motion for new trial hearing nor sought out or attempted to introduce their notes regarding the striking of jurors prior to trial; only the state attempted to elicit that information during the state's cross-examination of trial counsel, and the resulting testimony indicated that the state did have race-neutral reasons for using the state's peremptory strikes. Stokes v. State, 289 Ga. 702, 715 S.E.2d 81 (2011).

3. Impartiality of Jurors

No evidence prospective juror prejudged case. — When a prospective juror indicated that the prospective juror would expect a defendant to testify and would do the juror's best to follow the law if the court instructed the jury that no inference was to be drawn from the fact that the defendant chose not to testify, there was no error in the trial court's refusal to strike the prospective juror for cause, because nothing showed that the prospective juror had prejudged any issue in the case. Johnson v. State, 291 Ga. 621, 732 S.E.2d 266 (2012).

Examination of jurors on actions of one juror. — Defendant's claim that the defendant's trial counsel rendered ineffective assistance by failing to request that the trial court examine the remaining jurors whether the jurors had been affected by a juror after the juror had been removed was unsupported, and the defendant could not show prejudice or harm because there was no error on which to premise the claim of ineffective assistance; the defendant did not request that the trial court question the remaining jurors, and the juror's responses clearly indicated that the juror's statement to the other jurors about the juror's conflict was exceedingly minimal and that the others had no reaction to the statement. Sharpe v. State, 288 Ga. 565, 707 S.E.2d 338 (2011).

No bias shown. — Trial court did not err by refusing to excuse certain jurors, since the subject jurors indicated that the jurors would be able to base the jurors' decision on the evidence presented, would keep an open mind, and could consider all three sentencing options that would be available. Rice v. State, 292 Ga. 191, 733 S.E.2d 755 (2012).

Pretrial publicity did not require change of venue. — Trial counsel's failure to seek a change of venue on the ground of pretrial publicity as ineffective assistance of counsel failed since the only pretrial publicity shown in the record was a single newspaper article published the week before trial since there was no evidence that the trial's setting was inherently prejudicial or that the jury selection process showed actual prejudice. Williams v. State, 277 Ga. 853, 596 S.E.2d 597 (2004).

Admonition of counsel did not deprive of fair trial. — Because there was no evidence that the jury heard the trial court's comment to trial counsel during a bench conference or was influenced by the comment, the defendant failed to prove that the admonition deprived the defendant of a fair trial. Newkirk v. State, 290 Ga. 581, 722 S.E.2d 760 (2012).

Failure to discredit inmate witness. — Defendant's trial counsel was not ineffective for failing to discredit the veracity of an inmate witness who testified to the defendant's jailhouse confession because at trial, the inmate witness appeared in prison clothes, and the state elicited tes-

timony from the inmate that the inmate was a convicted felon; since the evidence was properly before the jury, it could not be shown that the omission was an unreasonable tactical move that no competent attorney in the same situation would have made. Brown v. State, 289 Ga. 259, 710 S.E.2d 751 (2011), cert. denied, 132 S. Ct. 524, 181 L. Ed. 2d 368 (2011).

Outside research shared with fellow jurors. — Defendant's rights to be present and to trial by a fair and impartial jury were violated when, during deliberations, a juror shared with fellow jurors legal definitions, which the juror found by using the Internet search engine Google®, and at least one such definition was incompatible with an affirmative defense the defendant pursued at trial, the defense of habitation, as it pertained to motor vehicles. Chambers v. State, 321 Ga. App. 512, 739 S.E.2d 513 (2013).

When jury's verdict may be impeached.

Counsel was not ineffective for not attempting to strike for cause a juror who worked as a security officer and who had twice been a robbery victim. As the juror stated that the juror could be fair and impartial, the circumstances did not require the trial court to strike the prospective juror for cause, and the defendant did not demonstrate that the trial court would have struck the prospective juror had counsel so moved. Crane v. State, 294 Ga. App. 321, 670 S.E.2d 123 (2008).

Confrontation of Witnesses

No confrontation violation when statements not testimonial. — Admission of statements that the victim made to a police investigator regarding the victim's fear of the defendant on the day that the victim was murdered did not violate the defendant's right to confrontation because the statements were not testimonial when the victim was not reporting a crime to the police officer or building a case against the defendant, the victim was merely seeking advice from a knowledgeable friend, who happened to be a police officer. Breedlove v. State, 291 Ga. 249, 728 S.E.2d 643 (2012).

Limited scope to relevant evidence.

With regard to a defendant's trial and ultimate conviction on charges of malice murder, armed robbery, and possession of a firearm during the commission of a felony, the trial court did not abuse its discretion in limiting the scope of the defendant's cross-examination of the testifying victims regarding the immigration status of the victims; the immigration status of the victims was not an issue relevant to the matter being tried, namely whether the defendant committed the crimes charged. Junior v. State, 282 Ga. 689, 653 S.E.2d 481 (2007).

Harmless error in admission of codefendant's statement. — Although the trial court erred by admitting a codefendant's statement to police, that error was harmless because the statement was cumulative of other properly admitted evidence; the defendant's own taped statement established the same set of facts set forth in the codefendant's statement, and the defendant admitted to exchanging angry words with the victim and to shooting the victim. Jackson v. State, 291 Ga. 22, 727 S.E.2d 106 (2012).

Codefendant's trial should have been severed. — Trial court erred in denying a codefendant's motion to sever the trial from the defendant's trial because the codefendant was not allowed to introduce the exculpatory portions of the statements that explained the excerpted admissions introduced by the state, which supported the codefendant's antagonistic defense that the codefendant was present at the robberies due to coercion by the defendant. To avoid potential Bruton issues, the state introduced only those portions of the codefendant's 9-1-1 calls or custodial statements made establishing that the codefendant was at the scene of two robberies, that the codefendant's vehicles were used, and that the codefendant sent police to a motel room to investigate the robberies, but refused the additional portions of the statements that tended to support the codefendant's defense that the codefendant was coerced into participating in the crimes. Bowe v. State, 288 Ga. App. 376, 654 S.E.2d 196 (2007), cert. dismissed, sub. nom., State v.

Baker, No. S08C0548, 2008 Ga. LEXIS 318 (Ga. 2008).

Restriction of cross-examination.

Trial court did not abuse the court's discretion by refusing to allow any cross-examination of an investigator as to that part of the defendant's custodial statement in which the defendant identified a codefendant as the individual to whom the defendant rented a panel van used as a methamphetamine lab. Inasmuch as the defendant did not testify, the admission of the defendant's custodial statement implicating the codefendant was barred by Bruton. Boone v. State, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

Counsel adequately prepared defendant for cross examination. — Defendant failed to support the claim that trial counsel did not adequately prepare the defendant to be cross-examined at trial because counsel testified that counsel met with the defendant in jail and discussed what the defendant was going to say on the stand and how to deal with "troublesome areas"; the defendant admitted that counsel told the defendant that the defendant would be cross-examined by the district attorney. Funes v. State, 289 Ga. 793, 716 S.E.2d 183 (2011).

Confrontation claim waived.

Defendant failed to make a contemporaneous objection on confrontation grounds to a state forensic biologist's testimony regarding the biologist's comparison of DNA profiles prepared by another lab to conclude that defendant's blood matched blood found at the scene of a murder and robbery; therefore, the error was not preserved for review. Moore v. State, 294 Ga. 682, 755 S.E.2d 703 (2014).

Victim's non-testimonial statement.

In a malice murder prosecution, the victim's statement to a friend that the defendant said that the defendant was going to kill the victim was admissible under the necessity exception to the hearsay rule as the victim was unavailable and the statements had sufficient indicia of reliability. As the statements were not testimonial, there was no Confrontation Clause violation. Smith v. State, 284 Ga. 304, 667 S.E.2d 65 (2008).

Trial court properly admitted hearsay statements made by a murder victim to the victim's mother and to the victim's friend regarding prior physical abuse by the defendant in defendant's murder trial because none of the out-of-court statements by the victim recounted at trial were even arguably testimonial as the United States Supreme Court had used that term in the court's recent Confrontation Clause jurisprudence. Brown v. State, 288 Ga. 364, 703 S.E.2d 609 (2010), cert. denied, 131 S. Ct. 2454, 179 L. Ed. 2d 1221, 2011 U.S. LEXIS 3708 (U.S. 2011).

Defendant's right to confrontation was not violated because an officer responded to the prior victim's 9-1-1 call within a few minutes and found the prior victim to still be "shaken up" from the prior victim's confrontation with the burglar, and the burglar, who had just left the scene armed with a knife, was still in the immediate vicinity. Thus, while the prior victim was no longer being immediately threatened, the armed perpetrator was still on the loose, and thus continued to pose a serious potential threat to the prior victim and the neighbors. When a court must determine whether the Confrontation Clause bars the admission of a statement at trial, the court should seek to ascertain, if possible, the primary purpose of the interrogation by objectively evaluating the statements and actions of the parties to the encounter in light of the circumstances in which the interrogation occurs. Philpot v. State, 309 Ga. App. 196, 709 S.E.2d 831 (2011).

Admission of 9-1-1 call.

In defendant's convictions on one count of simple assault and two counts of battery, trial court properly determined that audiotape of 9-1-1 call made by the victim was nontestimonial in nature as the caller advised that the caller had been hit, had a swollen face, was experiencing serious bleeding and the call was made with such immediacy after the attack that, upon the officer's arrival, the caller was scared and crying, and blood was running down the caller's chin, shirt, and pants; thus, trial court properly found that the call was nontestimonial in nature in that it was made to seek assistance in a situation involving immediate danger. Thompson v. State, 291 Ga. App. 355, 662 S.E.2d 135 (2008).

Allowing a jury to hear an audiotape of two 9-1-1 calls made by bystanders to report a shooting was proper because, inter alia, as the calls were made while the incident was ongoing, the perpetrator was at large, and the nature of the operator's questions were to assist the police in meeting an ongoing emergency, the statements were nontestimonial, and the confrontation clause was not implicated. Glover v. State, 285 Ga. 461, 678 S.E.2d 476 (2009).

Admission of hearsay.

The admission of an informant's testimony regarding knowledge of the defendant's participation in the victim's murder did not amount to inadmissible hearsay and did not violate the Confrontation Clause, as the hearsay was cumulative of admissible evidence adduced at trial and, in light of the overwhelming evidence of the defendant's guilt, there was no reasonable possibility that the confrontation violation contributed to the guilty verdict. Warren v. State, 283 Ga. 42, 656 S.E.2d 803 (2008).

Admission of testimonial statements. — Statements of the victim and the victim's friend were testimonial under Crawford and thus were inadmissible hearsay because the defendant had not had the prior opportunity to cross-examine the victim or the friend, who did not testify at trial. The primary purpose of the victim's identification of the defendant at the crime scene was to establish past facts with a view to future prosecution, and the friend was effectively being a witness against the defendant when the friend said that a knife was in the yard and that the defendant was the one who stabbed the victim. Cuyuch v. State, 284 Ga. 290, 667 S.E.2d 85 (2008).

Supreme court cautioned the trial court regarding hearsay statements of an alleged victim because the statements the alleged victim made to a police officer complaining of an alleged attack by the defendant were inadmissible if the defendant objected to them, and the affidavit testimony the alleged victim gave in connection with the victim's judicial complaint of domestic abuse was also hearsay, was testimonial in nature, and was inadmissible if objected to by the defendant; statements alleging that a criminal act has been committed that are made in response to a police officer's questions during a time when there is no longer an ongoing emergency are testimonial in nature, and it is a violation of the confrontation clause of the Sixth Amendment to admit hearsay accounts of them over a defendant's objection where the defendant has had no previous opportunity for cross-examination. Pope v. State, 286 Ga. 1, 685 S.E.2d 272 (2009).

Sixth Amendment rights of the defendants to confront the witnesses against the defendants were violated when the trial court allowed a Florida judge to testify as to the contents of three petitions for temporary protective injunctions that were filed in the judge's court when two of the petitions were filed by the decedent before the decedent's death and one of the petitions was filed by one of the defendants. This constituted reversible error as to the defendant who was implicated in the petitions, but constituted harmless error as to the other defendant who was not mentioned in the petitions. Miller v. State, 289 Ga. 854, 717 S.E.2d 179 (2011).

Trial court erred in admitting testimony relating to the codefendant's initial, non-custodial statement to police on the day of the murder because the statement was testimonial in nature and the defendant had no opportunity to examine the codefendant. Colton v. State, 292 Ga. 509, 739 S.E.2d 380 (2013).

Questioning of witness about similar transactions allegedly involving defendant. — It violated the Sixth Amendment's confrontation clause to ask a witness about a statement that the witness had made that implicated the defendant in two similar-transaction robberies. Despite the fact that limiting instructions were given, the procedure placed before the jury the content of the witness's statement, allowing the jury to infer that since the defendant committed the other robberies with the witness, the defendant committed the one at issue; furthermore, the error was not harmless because the witness was the only person who could connect the defendant to the two previous armed robberies. Deloatch v. State, 296 Ga. App. 65, 673 S.E.2d 576 (2009).

Control of the cross-examination of a witness, etc.

Because the trial court did not abuse the court's discretion in regulating cross-examination by instructing defense counsel to be clear with counsel's question, the defendant's constitutional right of confrontation was not violated. Baker v. State, 293 Ga. 811, 750 S.E.2d 137 (2013).

Confrontation clause is not offended, etc.

In a criminal trial with regard to a defendant's contention on appeal that a Crawford violation occurred as a result of the trial court refusing to sever the defendant's trial from the codefendant's trial, no reversible error was shown as the out-of-court statement at issue, namely that the codefendant called and said that the codefendant's vehicle had been used in an armed robbery, did not implicate the defendant as the state offered that evidence to show that the codefendant was involved, but that statement did not implicate the defendant's guilt. Further, on cross examination, the defendant's attorney asked the officer if that phone call directed police to the motel room where the defendant was found and arrested, which the officer answered in the affirmative, therefore, the defendant elicited the testimony and, likewise, two other complained of statements were either elicited by the defendant or never objected to at trial. Bowe v. State, 288 Ga. App. 376, 654 S.E.2d 196 (2007), cert. dismissed, sub. nom., State v. Baker, No. S08C0548, 2008 Ga. LEXIS 318 (Ga. 2008).

Murder victim's statements to neighbors, paramedics, and an officer identifying the defendant as the shooter were nontestimonial as the statements were made while the incident was still ongoing and the perpetrator was at large. Thus, the confrontation clause was not implicated, and the admission of the statements under former O.C.G.A. § 24-3-3 (see now O.C.G.A. § 24-8-803), the res gestae exception to the hearsay rule, did not violate the defendant's Sixth Amendment rights. Thomas v. State, 284 Ga. 540, 668 S.E.2d 711 (2008).

Trial court did not err by admitting incriminating statements a codefendant made to witnesses because the codefendant's statements were made during the pendency of the conspiracy and were admissible against the defendant under the coconspirator exception to the hearsay rule, former O.C.G.A. § 24-3-5 (see now O.C.G.A. § 24-8-801); the admission of the codefendant's statements to lay witnesses during the concealment phase of the conspiracy did not violate the confrontation clause because the codefendant's statements were not testimonial. Allen v. State, 288 Ga. 263, 702 S.E.2d 869 (2010).

Cross-examination as to agreement between witness and state.

Trial court did not abuse its discretion in precluding the defendant from asking the defendant's cousin, who was jointly indicted with the defendant and testified against the defendant, about the specific sentences the cousin would face if convicted because the cousin had no deal regarding the cousin's charges or sentences with the state in exchange for testimony; the trial court permitted a sweeping cross-examination, limiting only questions about the specific sentences that the cousin could face, and the defendant was allowed to elicit that the cousin was charged with the same murder, the same aggravated assault, and the same attempted armed robbery as the defendant and that those charges were still pending. The defendant also cross-examined the cousin regarding whether the cousin hoped to gain favorable treatment on the charges due to the testimony, and in response, the cousin admitted several times that although there was no deal with the state, the cousin hoped the charges would be dismissed because of the cousin's testimony, which was a benefit far greater than any sentence reduction. Howard v. State, 286 Ga. 222, 686 S.E.2d 764 (2009).

Trial court erred by restricting the codefendants' cross-examination of a witness regarding the changes in the witness's eligibility for parole resulting from a plea and sentencing deal the witness entered into with the state in return for the witness's testimony because the parole disparity could have provided the witness with bias in favor of or motivation to assist the state; the error could not be considered harmless because the codefen-

dants were prevented from fully exploring the possibility that the witness was biased in favor of the state due to the witness's parole disparity, while, at the same time, the state was allowed to argue in the state's closing that the witness would spend six years in jail for the crimes. Manley v. State, No. S10A0136, 2010 Ga. LEXIS 181 (Mar. 1, 2010).

Trial court did not abuse the court's discretion in prohibiting the defendant's cross-examination of a witness regarding the witness's first offender plea in order to show bias and a motive to testimony favorable to the state because there was no evidence showing the connection between the witness's first offender status and the witness's desire to shade the witness's testimony to curry favor with the state; the defendant had to present facts in addition to the existence of two first offender pleas to support the defendant's efforts to impeach the witness for bias. Sanders v. State, 290 Ga. 445, 721 S.E.2d 834 (2012).

Cross-examination as to potential bias of state's witness.

Trial court erred by denying codefendants any chance to proffer evidence that the victim's friend was aware of the disparity in the sentence the friend received under a plea agreement and the sentence the friend would have received if the friend had been convicted of murder and by summarily excluding any evidence of the friend's parole because the disparity, eligibility for parole after 30 years of incarceration versus two years served before eligibility, could have provided the friend with bias in favor of or motivation to assist the state; however, the error was harmless because the defendant and the codefendants were allowed to extensively cross-examine the friend about potential bias flowing from the plea deal with the state. Manley v. State, 287 Ga. 338, 698 S.E.2d 301 (2010).

Because parole eligibility is not irrelevant to a witness's potential bias, to the extent that Hewitt v. State, 277 Ga. 327 (2003), Mikell v. State, 286 Ga. 434 (2010) or other cases which rely on them, can be read to state that a trial court will never err by prohibiting cross-examination on parole eligibility because it is irrelevant to the question of a witness's potential bias, they are hereby overruled. Manley v. State, 287 Ga. 338, 698 S.E.2d 301 (2010).

Admission of detective's testimony regarding statements made by a police informant. — Defendant's right to confrontation was not violated by admission of the testimony of a narcotics detective regarding statements made by a police informant and which the detective heard via an audio transmitter during a drug buy, although the informant died prior to trial, because the testimony was not hearsay; the statements were incriminating admissions, and the informant's statements were not testimonial in nature because, although overheard by the police, the statements were not made to the police. Smith v. State, 302 Ga. App. 128, 690 S.E.2d 449 (2010).

Admission of child molestation victims' out-of-court statements, etc.

With regard to defendant's trial and conviction for child molestation, the trial court did not err by allowing the admission of the victim's hearsay statements as defense counsel had subpoenaed the victim and announced that defense counsel intended to call the victim as a trial witness; although the victim ultimately was not called to testify, the record established that the victim was present and available for cross-examination, and therefore, there was no Crawford v. Washington, 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), violation presented in the case. Williams v. State, 290 Ga. App. 841, 660 S.E.2d 740 (2008).

Non-testifying victim's statements pertinent to medical treatment. — With regard to a defendant's trial and conviction for aggravated sodomy and simple battery involving the sexual assault of an inmate upon an inmate, the trial court did not violate the defendant's rights under the Confrontation Clause by admitting the statements made by the victim to the physician and the nurse who treated the victim for the injuries received because the statements were admissible under former O.C.G.A. § 24-3-4 (see now O.C.G.A. § 24-8-803), the medical diagnosis or treatment exception, and did not fall within any class of testimonial statement. In particular, no objective witness would

reasonably conclude that the statements were made under such circumstances that the statement would be available for use at a later trial. Thomas v. State, 288 Ga. App. 602, 654 S.E.2d 682 (2007), cert. denied, No. S08C0725, 2008 Ga. LEXIS 471 (Ga. 2008).

Review of psychiatric records of witness. — Defendant's Sixth Amendment rights were not violated by a trial court's failure to conduct an in camera review of psychiatric records relating to an eyewitness to the defendant's crimes because defense counsel admitted to the trial court that there were no known psychiatric records pertaining to the eyewitness. Byrum v. State, 282 Ga. 608, 652 S.E.2d 557 (2007).

Hearsay exception satisfied confrontation clause.

In a defendant's prosecution for, inter alia, felony murder, the introduction of a second inmate's statement that the defendant and the second inmate did not mean to kill a third inmate did not violate the defendant's Sixth Amendment confrontation rights because the voluntary statement, which was made shortly after the third inmate was found in the defendant's cell, was admissible pursuant to the res gestae exception to the rule against hearsay under former O.C.G.A. § 24-3-3 (see now O.C.G.A. § 24-8-803). Butler v. State, 284 Ga. 620, 669 S.E.2d 118 (2008).

Trial court did not err in allowing the victim's cousin and the cousin's girlfriend to testify at trial about prior difficulties between the victim and the defendant pursuant to the necessity exception to the rule excluding hearsay, and the testimony did not violate the defendant's right to confrontation because the trial court concluded the proffered testimony of the witnesses was reliable and trustworthy as it found the victim was like a sibling to the witnesses; and because any alleged harm from the admission of that testimony was mitigated by the fact that both witnesses testified that the victim and the defendant continued to be friends in spite of their prior difficulties. Thompson v. State, 294 Ga. 693, 755 S.E.2d 713 (2014).

Cellmate's testimony. — Cellmate's testimony regarding incriminating statements the defendant allegedly made did not violate the defendant's Sixth Amendment right to counsel because the cellmate did not have any agreement with the lead detective and had not been promised any payment, lenient treatment, or other help in return for any evidence that the cellmate could produce; what the cellmate hoped to get for the testimony went to the cellmate's credibility, not to the admissibility of the cellmate's testimony, and there was no evidence that the cellmate deliberately elicited the incriminating statements from the defendant. Higuera-Hernandez v. State, 289 Ga. 553, 714 S.E.2d 236 (2011).

Codefendant's custodial statement. — Introduction of a codefendant's custodial statement, which was redacted to eliminate the defendant's name and was read into evidence at trial, violated the defendant's Sixth Amendment right to confrontation because despite the redaction, the codefendant's statement, taken in context, obviously referred to the defendant; there was no instruction given for the jury to consider the statement only against the statement's maker, and because the defendant had no opportunity to cross-examine the defendant's inculpatory statements against the defendant, the defendant's Sixth Amendment rights were violated. Ardis v. State, 290 Ga. 58, 718 S.E.2d 526 (2011).

Victim's statements to officer and paramedic. — The admission of statements by the deceased victim to an officer and to a paramedic that the defendant had struck the victim in the head did not violate the Confrontation Clause. The primary purpose of the officer's interrogation was to meet an ongoing emergency, and the statement to the paramedic was made during an initial examination and was not testimonial. Hester v. State, 283 Ga. 367, 659 S.E.2d 600 (2008).

Admission of a nontestifying codefendant's statement, etc.

With regard to the defendant's conviction for malice murder, the trial court violated a defendant's right to confrontation by admitting two prior inconsistent statements of a codefendant after the codefendant refused to testify and shut down during direct examination, therefore, the defendant was unable to

cross-examine the codefendant. However, the error were harmless beyond a reasonable doubt based on the defendant's admission to assisting in the killing and being with the codefendant at the time of the killing. Soto v. State, 285 Ga. 367, 677 S.E.2d 95 (2009).

Admission of a nontestifying codefendant's statement that listed all the other participants in the crime and substituted "a fourth person" and similar references obviously referred to the defendant and implicated the defendant in the crimes, and therefore admission of the statement was error. The error was harmless, however, because most of the statement was entirely cumulative of the defendant's own testimony and the defendant's statement to police. Laye v. State, 312 Ga. App. 862, 720 S.E.2d 233 (2011), cert. denied, 2012 Ga. LEXIS 280 (Ga. 2012).

Admission of a statement by the defendant's brother at a joint trial did not violate the defendant's right to confrontation because the jury was instructed only to consider the statement against the brother and the statement did not mention or implicate the defendant. Teasley v. State, 293 Ga. 758, 749 S.E.2d 710 (2013).

No Bruton violation if statements not inculpatory. — Defendant's custodial statements that the defendant was not present and that the defendant had an alibi did not inculpate codefendants. It followed that the trial court did not abuse the court's discretion in denying motions for mistrial on Bruton grounds. Metz v. State, 284 Ga. 614, 669 S.E.2d 121 (2008), overruled on other grounds, State v. Kelly, 290 Ga. 29, 718 S.E.2d 232 (2011).

Severance of defendants.

As neither defendant implicated the other in their statements to police, the trial court did not abuse the court's discretion in denying their motions to sever their cases on grounds of a violation of Bruton v. United States, 391 U.S. 123 (1968). Carter v. State, 285 Ga. 394, 677 S.E.2d 71 (2009).

Admission of non-testifying co-indictee's refusal to testify harmless error as no prejudice shown. — With regard to defendant's trial for felony murder and other crimes, trial court did not commit reversible error by holding co-indictee in contempt for refusing to testify after invoking the Fifth Amendment and then recalling the jurors and informing them that co-indictee had pled guilty to various offenses, refused to cooperate with state despite an offer of immunity, and that co-indictee had been held in contempt for that refusal. Hendricks v. State, 283 Ga. 470, 660 S.E.2d 365 (2008).

Failure to subpoena witnesses as ineffective assistance. — Defendant failed to establish that trial counsel rendered ineffective assistance by failing to subpoena a witness because the defendant failed to carry the burden of showing that if the witness had testified at trial, there was a reasonable probability the result of the trial would have been different; the defendant did not specify which witnesses counsel failed to subpoena. Glass v. State, 289 Ga. 542, 712 S.E.2d 851 (2011).

Telephone records as business records and counsel's objection without merit. — Although the defendant claimed that trial counsel was ineffective in permitting the admission of certain phone records, trial counsel did object to admission of the records, but the trial court overruled the objection; the evidence showed that the records were maintained in computer storage as business records, and the trial court therefore did not err in admitting the records under the business records exception to the hearsay rule. The defendant thus failed to demonstrate deficient performance and, in any event, due to the overwhelming evidence of the defendant's guilt, no prejudice was shown. Washington v. State, 285 Ga. 541, 678 S.E.2d 900 (2009).

Inspection certificates admissible under Melendez-Diaz. — Testing certificates for a breath-testing machine were properly admitted into evidence in a defendant's trial for driving under the influence (less safe and per se) under former O.C.G.A. § 24-3-14 (see now O.C.G.A. § 24-8-803) and O.C.G.A. § 40-6-392(f). The documents did not come within Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). Ritter v. State, 306 Ga. App. 689, 703 S.E.2d 8 (2010).

Loss of right to be present at trial through disruptive behavior.

Trial court did not abuse the court's discretion in proceeding with the trial in the defendant's absence because of the defendant's bizarre and disruptive behavior during the trial. Weaver v. State, 288 Ga. 540, 705 S.E.2d 627 (2011).

Child victim's statement or testimony. — Former Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), as construed by the supreme court in Sosebee v. State, 257 Ga. 298 (1987) and in other appellate cases, cannot pass constitutional muster because the statute failed to put the onus on the prosecution to put the child victim on the witness stand to confront the defendant, and any cases suggesting the contrary were hereby overruled; however, the statute could be construed to survive a Confrontation Clause attack because the right of confrontation could be satisfied by construing the statute to require pretrial notice of the state's intent to use a child victim's hearsay statements. Hatley v. State, 290 Ga. 480, 722 S.E.2d 67 (2012).

Former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) required the prosecution to notify the defendant within a reasonable period of time prior to trial of the statute's intent to use a child victim's hearsay statements and to give the defendant an opportunity to raise a Confrontation Clause objection; if the defendant objects, and the state wishes to introduce hearsay statements under former O.C.G.A. § 24-3-16, the state must present the child witness at trial; if the defendant did not object, the state could introduce the child victim's hearsay statements subject to the trial court's determination that the circumstances of the statements provide sufficient indicia of reliability, and the trial court should take reasonable steps to ascertain, and put on the record, whether the defendant waived the defendant's right to confront the child witness. Hatley v. State, 290 Ga. 480, 722 S.E.2d 67 (2012).

Defendant's right of confrontation was not violated by the introduction of the victim's hearsay statements under the former Child Hearsay Statute, O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), because the victim's statements to the victim's mother were non-testimonial, whereas the victim's statement to the forensic interviewer, made several weeks after the crimes, was testimonial; but even if the victim's statement to the forensic examiner, and the statements made by the victim and the victim's mother to the police were admitted erroneously, the errors were harmless beyond a reasonable doubt. The victim's statement to the forensic interviewer was the same as the victim's statement to the victim's mother, and the statements made by the victim and the victim's mother to police were cumulative of the victim's statement to the victim's mother, as well as the mother's testimony and the forensic evidence properly admitted against the defendant. Hatley v. State, 290 Ga. 480, 722 S.E.2d 67 (2012).

Detective's statements. — Detective's testimony about the existence of a codefendant's statement as evidence against a defendant did not, standing alone, directly incriminate the defendant. Therefore, the defendant's right to confrontation was not violated. Ham v. State, 303 Ga. App. 232, 692 S.E.2d 828 (2010).

Police detective's testimony did not violate the defendant's right to confrontation because the statement which the detective recounted was made by the defendant rather than by the codefendant as the defendant asserted. Herbert v. State, 288 Ga. 843, 708 S.E.2d 260 (2011).

Hearsay testimony of police officers.

Even though a witness's statements to an officer that the witness was afraid of defendant, to which the officer testified at trial, were testimonial in nature and thus were subject to exclusion pursuant to the Confrontation Clause protections set forth in Crawford v. Washington, 541 U.S. 36 (2004); admission of this testimony was harmless beyond a reasonable doubt because it was cumulative of other admissible evidence. Bell v. State, 294 Ga. 443, 754 S.E.2d 327 (2014).

Reference to "they" including codefendant. — Denial of a motion to sever was appropriate because the first defendant, in either of the defendant's statements, did not name or inculpate the

second defendant. A reference to "they," standing alone, did not directly implicate the second defendant in the crimes and the remainder of the first defendant's remarks referred only to the first defendant. Nelms v. State, 285 Ga. 718, 681 S.E.2d 141 (2009), cert. denied, 558 U.S. 1127, 130 S. Ct. 1089, 175 L. Ed. 2d 910 (2010).

Victim's statement to assistant D.A. was testimonial. — Murder victim's statement to an assistant district attorney, an officer of the state, was testimonial in nature; because the victim was unavailable, admission of the hearsay statement violated the defendant's right to confrontation. Lindsey v. State, 282 Ga. 447, 651 S.E.2d 66 (2007).

Verified petition seeking a protective order from the defendant, filed by the murder victim 11 days before the victim's death, was testimonial in nature and the petition's admission violated the defendant's right to confrontation, but any error was harmless given the testimony of seven police officers regarding eight calls for domestic violence at the home of the defendant and the victim. Brown v. State, 288 Ga. 404, 703 S.E.2d 624 (2010).

No right to cross-examine defendant's own translator. — With regard to various drug-related convictions, defendant's Sixth Amendment right to confrontation was not violated by the trial court refusing to allow defendant to cross-examine defendant's Spanish translator after defendant's tape-recorded statement was played before the jury and defendant asserted that certain statements were translated incorrectly as, under the language conduit rule, the translator's statements were defendant's own and, therefore, defendant had no right to, in essence, confront defendant. Hernandez v. State, 291 Ga. App. 562, 662 S.E.2d 325 (2008), cert. denied, No. S08C1631, 2008 Ga. LEXIS 763 (Ga. 2008).

Trial court did not err in finding that the defendant failed to meet the defendant's burden of showing that the performance of the defendant's attorneys was deficient because the defendant's counsel recognized the need for interpreters and secured the interpreters; the defendant, who spoke only Spanish, had ample opportunity to inform counsel or the trial court of any problems with the interpreters, and the fact that the defendant did not do so hampered the defendant in meeting the defendant's burden to show that counsel's performance in securing interpreters to assist the defendant was inadequate. Pineda v. State, 288 Ga. 612, 706 S.E.2d 407 (2011).

Defendant's confrontation rights not violated.

Because a deceased witness was unavailable for trial, and the defendant was afforded an adequate opportunity to cross-examine the witness at a sentencing trial held before the defendant withdrew a guilty plea, the admission of the witness's prior testimony at the defendant's guilt/innocence trial would not violate the confrontation clause. Martin v. State, 284 Ga. 504, 668 S.E.2d 685 (2008).

There was no violation of a defendant's Sixth Amendment right to confrontation when the defendant declined to cross-examine a codefendant who had refused to answer certain questions on direct examination. No effort was made by defense counsel to ascertain whether the codefendant would continue the codefendant's refusal to answer certain questions or would offer testimony in explanation of the codefendant's prior trial testimony or in exculpation of the defendant. Green v. State, 298 Ga. App. 17, 679 S.E.2d 348 (2009).

Admitting testimony of a supervisor who did not do every step of DNA testing did not violate the defendants' rights to confrontation because the supervisor performed every step of the test except for only being present when another technician only put test samples and controls into a scientific instrument used to complete a single step of the testing. Disharoon v. State, 291 Ga. 45, 727 S.E.2d 465 (2012), cert. denied, U.S. , 133 S. Ct. 767, 184 L. Ed. 2d 507 (2012).

Harmless error.

Because the state's evidence in support of its charges was overwhelming, even if the trial court erred in permitting a witness to testify regarding statements made to the witness by the victim, the error was harmless. Thus, no violation of the defendant's confrontation rights occurred. Debro v. State, 282 Ga. 880, 655 S.E.2d 804 (2008).

In a defendant's prosecution for malice murder and cruelty to children, while the trial court erred in admitting evidence that the five-year-old victim on a prior occasion had stated to a military police officer that the defendant had caused a bruise on the victim's face because such statements were testimonial and violated the defendant's right to confrontation under U.S. Const., amend. VI, any error was harmless based on overwhelming evidence of the defendant's guilt due to the defendant's admission that the defendant shook the victim, striking the victim's head on the railing of a bunk bed. Wright v. State, 285 Ga. 57, 673 S.E.2d 249 (2009).

Cumulative or harmless statement. In a defendant's prosecution for, inter alia, felony murder, the defendant's Sixth Amendment right to confrontation was violated by the prosecutor's statement, after a demonstration during which the prosecutor poured bleach on the prosecutor's hands, that the prosecutor's hands were not stinging yet, made in response to the defendant's claim that the defendant did not pour bleach on the defendant's hands immediately after the shooting incident to remove gunshot residue. The defendant was not entitled to a new trial on that basis, however, because the improper bleach evidence was collateral and significant evidence of the defendant's guilt, including an admission that the defendant did not mean to shoot the victim, had been presented. Sumlin v. State, 283 Ga. 264, 658 S.E.2d 596 (2008).

Trial court did not err in allowing one of the state's witnesses to testify that another state witness told him immediately before the shooting that the witness had seen the defendant get a gun from the car in which the defendant was a passenger that night because the admission of the statement did not violate the defendant's Sixth Amendment right to confrontation since the statement was not testimonial in nature; because the statement was cumulative of other admissible evidence that the defendant had a gun at the time of the shooting, most significantly, the defendant's own testimony that the defendant was in fact the shooter, admission of the statement, even if erroneous, was clearly harmless. Anderson v. State, 286 Ga. 57, 685 S.E.2d 716 (2009).

No violation of rule of sequestration. — Trial counsel was not ineffective for failing to request a jury charge on the violation of the rule of sequestration because there was no violation of the rule; even assuming that trial counsel's failure to request such a charge constituted deficient performance, the defendant could not demonstrate prejudice in light of the overwhelming evidence substantiating the defendant's guilt. Dockery v. State, 287 Ga. 275, 695 S.E.2d 599 (2010).

Defendant failed to establish that trial counsel rendered ineffective assistance by failing to move for a mistrial regarding a violation of the rule of sequestration because there was no evidence as to which witnesses violated the rule and whether the witnesses actually testified or spoke about the witnesses' testimony; the defendant did not show that the outcome of the trial would have been different if counsel called an expert to assist the jury in understanding eyewitness identifications. Glass v. State, 289 Ga. 542, 712 S.E.2d 851 (2011).

Unavailable witnesses. — Defendant's right to a speedy trial was not violated because the defendant made no challenge to the finding that the defense's failed to show diligence in attempting to locate certain witnesses, i.e., that the witnesses were unavailable to the defendant. Williams v. State, 290 Ga. 24, 717 S.E.2d 640 (2011).

Compulsory Process

Right not violated when subpoenas issued. — Defendant's claim that the right to compulsory process was circumvented when the trial court granted the state's motion to quash subpoenas issued to a judge, a probation officer, and a drug-court coordinator failed because the subpoenas were issued and served on the witnesses who, in fact, appeared and whose testimony was proffered outside the presence of the jury. Poole v. State, 291 Ga. 848, 734 S.E.2d 1 (2012).

Out of state corporation. — Court of appeals erred when the court concluded that a request under the former Uniform Act to Secure the Attendance of Witnesses

from Without the State in Criminal Proceedings, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90), that an out-of-state corporation be required to produce purportedly material evidence in the corporation's possession had to be accompanied by the identification as a material witness of the corporate agent through which the corporation was to act because if the certificate of materiality was issued by the Georgia court, it was for the Kentucky corporation to identify the human agent through whom the corporation would act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia certificate of materiality. Yeary v. State, 289 Ga. 394, 711 S.E.2d 694 (2011).

Right to Counsel

1. In General

Breakdown in the public defender system. — Trial court's finding that there had been a breakdown in the public defender system based on a lack of funding for the defense of a capital murder case was vacated because it did not address alternatives to funding and investigation costs and it did not employ the Barker v. Wingo speedy trial balancing test, of which a breakdown in the system, if found, was only one factor. Phan v. State, 287 Ga. 697, 699 S.E.2d 9 (2010).

Right to counsel if defendant is sentenced to probation. — Rule announced in Alabama v. Shelton, 535 U.S. 654 (2002) that absent a knowing and intelligent waiver of the right to counsel, no indigent person may be sentenced to a probated or suspended prison term unless the person was represented by counsel at the person's trial, was required to be applied retroactively to a habeas petitioner who had been sentenced to probation. Alford v. State, 287 Ga. 105, 695 S.E.2d 1 (2010).

Effect of request for attorney on interrogation.

While non-custodial and custodial statements were properly admitted, as not vitiating the defendant's constitutional rights once defendant invoked the right to counsel, a subsequent interview initiated by police violated this right; as a result, cocaine seized through information obtained from the interview had to be suppressed as fruit of the poisonous tree. Vergara v. State, 283 Ga. 175, 657 S.E.2d 863 (2008).

A defendant signed a Miranda waiver, but then requested counsel. The defendant's subsequent statements to another officer, who knew of the waiver but not of the defendant's request for counsel, were inadmissible as the officer initiated the conversation by explaining the preliminary hearing process, and this conversation did not fall within the "booking exception" to Miranda or serve any other administrative function. State v. Darby, 284 Ga. 271, 663 S.E.2d 160 (2008).

Conversation with government informant.

Defendant did not receive ineffective assistance of counsel when trial counsel's objection was not made contemporaneously to testimony because despite counsel failing to object contemporaneously, the trial court acknowledged the objection by admonishing the prosecutor not to ask any more questions regarding the defendant's incarceration; thus, even if counsel was deficient for the delayed objection, the defendant was not prejudiced thereby. Kitchens v. State, 289 Ga. 242, 710 S.E.2d 551 (2011).

Response to deadlocked jury. — Even if the failure of the trial court to inform defense counsel of the contents of a note from a deadlocked jury and to seek comment on or input in the formulation of the trial court's response was a violation of the defendant's Sixth Amendment right to counsel, any error was harmless because the ensuing Allen charge, though partly inaccurate, was otherwise balanced and fair and, thus, did not constitute reversible error. Lowery v. State, 282 Ga. 68, 646 S.E.2d 67, cert. denied, 552 U.S. 999, 128 S. Ct. 508, 169 L. Ed. 2d 355 (2007).

No ineffective assistance based on witness's ten year old conviction. — Defense counsel was not ineffective for failing to object to the trial court's exclusion of a state witness's conviction without conducting the balancing test required by former O.C.G.A. § 24-9-84.1(a)(1) (see now O.C.G.A. § 24-6-609) because the defendant made no showing that the prior conviction would have been admitted not-

withstanding the stringent limitations in former § 24-9-84.1(b) on the use of a conviction more than ten years old. Chance v. State, 291 Ga. 241, 728 S.E.2d 635 (2012).

2. When Right Attaches

Right to counsel does not arise until adversary judicial proceedings are commenced.

There was no violation of U.S. Const., amend. VI with respect to the admission of written and recorded statements made by the defendant to a police officer regarding the investigation of an alleged hit-and-run accident, which were later determined to be false, as there were no charges yet pending against the defendant and the statements were made in a non-custodial interview, such that the right to counsel had not yet attached; there was accordingly no ineffectiveness of counsel for failing to seeking suppression of the statements. Harvill v. State, 296 Ga. App. 453, 674 S.E.2d 659 (2009).

Presence of counsel not required during investigatory stages of the case.

It was not error to admit a defendant's statements to an expert appointed pursuant to O.C.G.A. § 17-7-130.1 to examine the defendant upon the defendant's assertion of an insanity defense because: (1) the state had a statutory right, under O.C.G.A. § 17-7-130.1, to call the expert to rebut the testimony of the defendant's expert regarding the defendant's mental state at the time of the crimes charged; (2) the defendant had no Sixth Amendment right to counsel during the expert's examination or Fifth Amendment right requiring the repetition of the defendant's Miranda rights during the interview with the appointed expert; and (3) the defendant's counsel was aware of the psychiatric interview and chose not to attend. Walker v. State, 290 Ga. 467, 722 S.E.2d 72 (2012).

Voice identification procedure.

Even if trial counsel was ineffective for failing to listen to a 9-1-1 tape prior to trial, given the overwhelming evidence supporting the defendant's convictions, particularly the eyewitness testimony, the defendant failed to show that there was a reasonable probability that the outcome of the trial would have been different but for counsel's error. Thus, this ineffectiveness claim failed. Taylor v. State, 295 Ga. App. 689, 673 S.E.2d 7 (2009), aff'd, 286 Ga. 328, 687 S.E.2d 409 (2009).

3. Appointment, Retention, and Dismissal

Indigency as prerequisite to right.

There was no violation of the defendant's right to counsel under U.S. Const., amend. VI because the defendant did not provide any evidence to show that the defendant lacked the financial resources to retain a lawyer, such that the trial court was not required to provide appointed counsel. Harvill v. State, 296 Ga. App. 453, 674 S.E.2d 659 (2009).

Right to discharge appointed counsel and have another appointed.

In defendant's convictions for armed robbery, kidnapping, and aggravated assault in connection with robbery of a fast food restaurant, trial court did not err by refusing to appoint new trial counsel after defendant made it known that defendant was dissatisfied with trial counsel and had filed a bar complaint against trial counsel; trial court gave defendant choice between keeping current trial counsel or proceeding pro se, and defendant chose to proceed with current counsel. Holsey v. State, 291 Ga. App. 216, 661 S.E.2d 621 (2008).

Trial court did not err in directing the defendant's attorney to remain during trial, etc.

Because a defendant failed to show that appointed counsel could not provide the defendant effective representation, the trial court did not abuse its discretion in denying the defendant's motion to replace counsel three months before the start of trial, despite the defendant's allegations that appointed counsel screamed at and insulted the defendant, lied to the defendant, failed to relay to the defendant a threat made against the defendant's family by a codefendant, and used false methods of persuasion in an attempt to get the defendant to accept the state's plea offer. Kollie v. State, 301 Ga. App. 534, 687 S.E.2d 869 (2009).

Ineffective representation.

Court of appeals erred in deferring to

public defender's own policy not to appoint new counsel for purposes of appeal and denying indigent defendant's request to raise an ineffectiveness claim as part of a new trial motion as defendant was constitutionally entitled to appointment of conflict-free counsel to represent him on appeal. Garland v. State, 283 Ga. 201, 657 S.E.2d 842 (2008).

4. Conflicts of Interest and Joint Representation

Conflict of interest cognizable on habeas corpus. — An inmate's claim that trial counsel had a conflict of interest was a Sixth Amendment claim and thus was cognizable on habeas corpus. Gibson v. Head, 282 Ga. 156, 646 S.E.2d 257 (2007).

Right not violated when defendant discharged fourth court-appointed attorney. — Defendant's Sixth Amendment right to counsel was not violated when the trial court refused to continue the defendant's child molestation trial when the defendant attempted to discharge the fourth appointed attorney the defendant had been assigned on the day of trial. The trial court gave the defendant warnings of the dangers of proceeding pro se, the defendant proceeded the first day with standby counsel, and after the first day, the defendant again had full representation. Cain v. State, 310 Ga. App. 442, 714 S.E.2d 65 (2011).

No simultaneous right to counsel and pro se representation.

Trial court did not err in finding that the defendant knowingly, voluntarily, and intelligently waived the defendant's right to have a lawyer represent the defendant at trial because the record authorized the trial court to conclude that the defendant's expression of dissatisfaction with the defendant's third lawyer on the day of trial was a dilatory tactic that was the functional equivalent of a knowing and voluntary waiver of appointed counsel, and after the defendant indicated the defendant's desire to proceed pro se, the extensive colloquy between the defendant and the trial court established that the defendant made a knowing and intelligent waiver of the defendant's right to counsel; the defendant did not explain how the knowledge that the defendant could face lesser punishment than the defendant believed would have made the defendant less inclined to waive counsel and the record demonstrated that the defendant was aware of the dangers of self-representation and nevertheless made a knowing and intelligent waiver. Walker v. State, 288 Ga. 174, 702 S.E.2d 415 (2010).

Simultaneous representation of county and criminal defendant.

Trial counsel did not labor under a conflict of interest because counsel's representation of the state in a guilty plea entered almost five years before the crimes at issue did not fall within the parameters of the Sixth Amendment, and even assuming the existence of an actual conflict of interest, the defendant would be required to demonstrate that the conflict significantly affected counsel's performance, which the defendant failed to do; the record supported the trial court's finding that trial counsel did not remember counsel's work for the state against the defendant until after the jury verdict had been rendered, and the defendant did not allege that counsel's performance at sentencing was affected by the discovery of that information. Lanier v. State, 288 Ga. 109, 702 S.E.2d 141 (2010).

Prior employment in public defender's office. — Trial court erred in granting a new trial based on ineffective assistance of counsel due to counsel's prior employment in a public defender's office where another attorney had briefly represented the state's key witness against the defendant because the defendant failed to show how the conflict of interest compromised the attorney's representation of the defendant. State v. Abernathy, 289 Ga. 603, 715 S.E.2d 48 (2011).

Failure to raise issue because of agreement by public defender's office. — An inmate had been denied effective assistance of counsel under the Sixth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XIV based on an actual conflict of interest because both trial and appellate counsel did not diligently pursue a jury array issue based on an agreement that the public defender's office had with superior court judges, despite their

belief that the issue was a strong one. The attorneys' duties to their employer, the public defender's office, directly conflicted with their duties of loyalty and zealous advocacy to their client under Ga. St. Bar R. 4-102(d):1.7, and the conflict significantly affected the representation the inmate received. Edwards v. Lewis, 283 Ga. 345, 658 S.E.2d 116 (2008).

Joint representation when one defendant pays all fees. — Habeas court did not err in granting the appellee's petition for writ of habeas corpus because there was no error in the habeas court's finding of an actual conflict of interest that adversely affected plea counsel's performance since the fact that the codefendant alone was paying counsel's fees created a strong incentive for counsel to prioritize the codefendant's interests in the matter over the appellee's interest, and counsel not only failed to pursue an alternative defense theory on behalf of the appellee, counsel failed even to recognize the possibility that one could exist; even though the appellee and the codefendant pursued a unified defense in that their accounts of the incident were consistent, the record reflected that the appellee was the less culpable of the two in the crime, as it appeared that the appellee's participation was limited to the role of a passive witness who happened to be driving when the codefendant initiated the brief, apparently unpremeditated interaction with the victim. State v. Mamedov, 288 Ga. 858, 708 S.E.2d 279 (2011).

No conflict of interest. — Record belied any assertion that trial counsel had any divided loyalties between the defendant and a man who had been a suspect in the murder and testified as a state's witness at trial or that counsel represented the man in any way during the defendant's trial because counsel actually targeted the man as one of the people other than the defendant who had actually committed the murder. Wheeler v. State, 290 Ga. 817, 725 S.E.2d 580 (2012).

5. Duties and Effectiveness of Counsel

Trial counsel was not ineffective for failing to make certain objections. — Counsel testified that counsel failed to make certain objections during opening and closing and in regard to witness bolstering for strategic reasons and that counsel decided after extensive discussion not to call the defendant as a witness because counsel believed the potential downside was overwhelming. Rawls v. State, 315 Ga. App. 891, 730 S.E.2d 1 (2012).

Pending disciplinary action not ineffective assistance per se. — Trial counsel was not ineffective per se due to the fact that there was a pending disciplinary action against counsel at the time of trial or due to the subsequent surrender of counsel's license to practice law. Simmons v. State, 291 Ga. 705, 733 S.E.2d 280 (2012).

Presumption regarding performance of counsel.

With regard to defendant's convictions for aggravated child molestation and two counts of child molestation after a bench trial, because defendant failed to call trial counsel at the hearing on defendant's motion for a new trial, defendant was unable to establish that defendant received ineffective assistance of counsel at trial based on trial counsel: (1) failing to adequately investigate the case; (2) failing to present an interview report as evidence; and (3) failing to object to hearsay testimony regarding the victims' abuse allegations; therefore, the presumption remained that trial counsel strategically elected not to offer the interview report as evidence. Further, even if the child victim's statements were not admissible under the child hearsay statute, there was no ineffective assistance since defendant confirmed the statements through his own trial testimony. Brumbelow v. State, 289 Ga. App. 520, 657 S.E.2d 603 (2008).

When issue must be raised.

Defendant's claim that counsel was ineffective for not raising the issue of the validity of the defendant's prior convictions was procedurally barred because the defendant had not raised the issue in the defendant's motion for new trial. The defendant could not resuscitate the issue by raising the issue under the guise of an ineffective assistance of appellate counsel claim. McGlocklin v. State, 292 Ga. App. 162, 664 S.E.2d 552 (2008).

Waiver of claim of ineffective assistance.

Defendant abandoned claims of insufficient investigation and trial preparation when those claims were merely general and bald assertions, unsupported by argument or citation of authority; as for the defendant's other claims, a failure to make meritless objections could not support an ineffective assistance of counsel claim. Sampson v. State, 282 Ga. 82, 646 S.E.2d 60 (2007).

Test for asserting ineffective assistance of counsel claim.

In determining prejudice on an ineffective assistance of counsel claim under Strickland, a defendant has to show that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; Georgia cases that deviated from that standard by eliminating the reasonable probability language, thereby putting a more stringent burden on the defendant, are thus disapproved. Miller v. State, 285 Ga. 285, 676 S.E.2d 173 (2009).

To determine effectiveness, totality of circumstances must be examined.

Habeas court erred by reversing a defendant's death sentence imposed for a murder based on the defendant's claim of ineffective assistance of counsel for trial counsel's failure to present evidence of the defendant's mental health status and for failing to present other mitigation evidence as, considering the combined effect of trial counsel's various professional deficiencies, as a matter of law, there was no possibility that absent trial counsel's professional deficiencies a reasonable probability existed that a different outcome would have occurred. Schofield v. Cook, 284 Ga. 240, 663 S.E.2d 221 (2008).

Trial strategy.

Defendant's numerous claims of ineffective assistance of counsel were rejected as the way counsel handled the defense was part of a reasonable trial strategy, even though the defendant claimed that counsel should have: (1) conducted a more in depth voir dire; (2) called the experts who prepared allegedly exculpatory laboratory reports; (3) examined the alibi witnesses about their prior criminal histories; (4) presented evidence to counter the state's evidence of robbery as a motive; and (5) interviewed the defendant's Army friend to determine that a discharge against that individual was dishonorable; even if counsel had undertaken these steps, the outcome would not have changed. Tolbert v. State, 282 Ga. 254, 647 S.E.2d 555 (2007).

Counsel was not ineffective for presenting an alibi defense when the defendant contended before trial that the defendant was at home when the crime occurred; counsel's decision was a reasonable trial tactic and did not amount to ineffectiveness because the defendant and the defendant's present counsel questioned its efficacy. Johnson v. State, 282 Ga. 235, 647 S.E.2d 48 (2007).

Trial counsel was not ineffective for not emphasizing that no blood was found in the rooming house where a murder defendant and the victim lived; defense counsel had established the absence of forensic evidence, which would include blood evidence, inside the house, and had emphasized this during closing argument, and it could not be said that counsel was ineffective simply because another attorney might have placed more or a different emphasis on the evidence. Jones v. State, 282 Ga. 306, 647 S.E.2d 576 (2007).

With regard to defendant's convictions for malice murder and other crimes, defendant failed to show that defense counsel was ineffective for failing to impeach four witnesses' testimony by the witnesses' convictions as such impeachment would have caused defense counsel to lose the right to make the final closing argument under O.C.G.A. § 17-8-71. Adams v. State, 283 Ga. 298, 658 S.E.2d 627 (2008).

Trial counsel's decision not to impeach a witness and to develop that witness as a suspect in the murder for which defendant was on trial, as part of the strategy to preserve the right to final argument under O.C.G.A. 17-8-71, did not amount to deficient performance. Eason v. State, 283 Ga. 116, 657 S.E.2d 203 (2008).

In a felony murder prosecution, defense counsel was not ineffective for failing to object to testimony about the ballistics findings made by a crime lab on grounds of hearsay and the state's failure to supply the ballistics report in discovery. As the

overall defense strategy was that the defendant did not commit the crimes, the specifics of the crimes were less material. McKenzie v. State, 284 Ga. 342, 667 S.E.2d 43 (2008).

Decision not to object to the admission of a codefendant's guilty plea could have been the result of reasonable trial strategy; since the defendant did not call the defendant's trial counsel to testify at the hearing on the motion for new trial, and in the absence of evidence to the contrary, counsel's decisions were presumed to be strategic and thus insufficient to support an ineffective assistance of counsel claim. In any event, the evidence of the defendant's guilt was overwhelming, there was no reasonable probability the outcome would have been more favorable had counsel done the things the defendant claimed that counsel should have, and no prejudice was shown. Washington v. State, 285 Ga. 541, 678 S.E.2d 900 (2009).

Counsel was not ineffective for failing to object to the state's opening comment that the defendant's story was "ludicrous" and "crazy." Counsel testified that counsel did not object because the statement was not evidence and because objecting could bring attention to the comments; this was a conscious and deliberate trial strategy. Raymond v. State, 298 Ga. App. 549, 680 S.E.2d 598 (2009), cert. denied, No. S09C1791, 2010 Ga. LEXIS 47 (Ga. 2010).

An armed robbery defendant's counsel was not ineffective for failing to object to fingerprint evidence, because the theory of defense was that defendant was present in the store, but that the crime was not an armed robbery. Defense counsel's decision not to call two witnesses was also supported by counsel's trial tactics and strategy. Crawford v. State, 302 Ga. App. 782, 691 S.E.2d 660 (2010).

Although defendant contended defendant's trial counsel was ineffective because the defendant chose to pursue a theory of defense in which the defendant argued that the defendant was unaware that the defendant was being arrested and, thus, could not have knowingly resisted, instead of pursuing a defense in which the defendant argued that defendant legally resisted an unlawful arrest, counsel's decision as to which theory of defense to pursue is a matter of strategy and tactics; and, as a general rule, matters of tactics and strategy, whether wise or unwise, did not amount to ineffective assistance of counsel. Defendant had not shown that counsel's strategy was so patently unreasonable that no competent attorney would have chosen that strategy. Zeger v. State, 306 Ga. App. 474, 702 S.E.2d 474 (2010).

Trial counsel was not ineffective because the defendant failed to show trial counsel's alleged inadequate preparation or communication with the defendant; counsel did object to the co-defendant's out of court statements because counsel believed that some of the things that the co-defendant said would actually help the defendant; and counsel submitted a written supplemental charge of voluntary manslaughter, which was rejected because the evidence did not support the charge of voluntary manslaughter. Browder v. State, 294 Ga. 188, 751 S.E.2d 354 (2013).

Failure to challenge indictment.

Trial counsel was not ineffective in failing to challenge the felony murder count of an indictment because the indictment contained sufficient facts to put the defendant on notice that the defendant was accused of the death of the victim as a result of an aggravated assault when the indictment alleged a specific offensive use of the defendant's hands and feet and that when the defendant's hands and feet were used in a particular way they were objects which were likely to and actually did result in serious bodily injury; the absence of self-defense, like general intent, did not have to be expressly alleged in an indictment, and even if some such allegation were necessary, language in the indictment asserting that defendant acted unlawfully and contrary to the laws of the state, the good order, peace and dignity thereof was sufficient. Lizana v. State, 287 Ga. 184, 695 S.E.2d 208 (2010).

Matters of strategy.

Trial court did not err by denying a defendant's motion for a new trial based on the defendant's contention that the defendant received ineffective assistance of counsel regarding convictions for aggravated sexual battery and child molesta-

tion involving the defendant's eight-year-old child as the trial transcript confirmed that trial counsel attempted to use the allegations that the defendant had abused siblings in the past in an effort to impeach or discredit the young victim on the premise that the young victim received the information from the other parent, which was trial strategy that did not amount to ineffective assistance. Dyer v. State, 295 Ga. App. 495, 672 S.E.2d 462 (2009).

Trial counsel's performance was not deficient because trial counsel testified that counsel received and reviewed discovery material provided by the district attorney and viewed the crime scenes, that counsel's investigator interviewed witnesses who gave statements to police, that counsel met with the defendant approximately six times in the months before trial, and that counsel ascertained that family members were willing to be alibi witnesses for the defendant, but counsel elected not to have the family members testify since the defendant acknowledged being at the crime scenes. Haynes v. State, 287 Ga. 202, 695 S.E.2d 219 (2010).

Defendant's claim that trial counsel's failure to preserve an issue constituted ineffective assistance of counsel was without merit because trial counsel's testimony showed that counsel pursued the reasonable strategy, however mistaken it could appear with hindsight, of placing the damaging information before the jury through the defendant's direct testimony, rather than risk having the information extracted from the defendant on cross-examination. Collier v. State, 288 Ga. 756, 707 S.E.2d 102 (2011).

When the defendant was on trial for murdering the defendant's paramour, as defense counsel decided not to further question a prospective juror, who had strong feelings about domestic violence, in order to avoid tainting the remaining jurors, this was a reasonable strategic decision that did not constitute ineffective assistance. Cade v. State, 289 Ga. 805, 716 S.E.2d 196 (2011).

Trial counsel's failure to object to the officer's testimony regarding statements made by a witness who did not testify did not amount to ineffective assistance because the decision was strategically made so as not to draw attention to the testimony. Durham v. State, 292 Ga. 239, 734 S.E.2d 377 (2012).

Trial counsel's decisions not to object to an opening statement that set forth admissible evidence or object to the admissibility of letters written by defendant was reasonable trial strategy that was not deficient performance. Poole v. State, 291 Ga. 848, 734 S.E.2d 1 (2012).

Based on trial counsel's testimony regarding pre-trial consultations with a trauma nurse and a physician, both of whom discounted the suggested alternative explanation for the victim's initial brain injury, trial counsel's strategic decision not to continue hunting for a defense expert, but instead to challenge the state's experts on cross-examination, was not unreasonable and did not constitute deficient performance. Brown v. State, 292 Ga. 454, 738 S.E.2d 591 (2013).

Defendant's claim that trial counsel offered ineffective assistance for not objecting to the trial court's failure to recharge the jury after the jury requested written definitions of the charges lacked merit because the decision was based on counsel's strategic decision that such a request only made the jury more inclined to convict the defendant rather than acquit the defendant. Lake v. State, 293 Ga. 56, 743 S.E.2d 414 (2013).

Tactical decisions by trial counsel.

Because a defendant had not questioned trial counsel at the hearing on the motion for new trial about counsel's alleged failure to object to certain comments, any decision not to object was presumed to be a strategic one that did not amount to ineffective assistance. John v. State, 282 Ga. 792, 653 S.E.2d 435 (2007).

Counsel was not ineffective where tactics used were for trial strategy.

Because the defendant's trial counsel was not ineffective in presenting a defense and requesting jury instructions on the defendant's claim of innocence, and was authorized to forego objection to a challenged portion of the state's closing argument, the defendant's ineffective assistance of counsel claims lacked merit and did not warrant a new trial. King v. State, 282 Ga. 505, 651 S.E.2d 711 (2007).

With regard to defendant's conviction for armed robbery and other crimes, the trial court did not err in denying defendant's motion for new trial when the court found that defendant did not carry the burden of showing ineffective assistance based on defense counsel failing to object to the introduction into evidence of the guilty plea of the gunman/co-indictee and further failed to request a limiting instruction thereon as the evidence supported the trial court's findings that those decisions were strategic and not patently unreasonable. Trial counsel testified at the motion for a new trial hearing that the guilty plea of the gunman was important to the defense strategy of placing all the blame on the gunman as well as showing the jury that defendant would serve a lengthy sentence if the jury found the defendant guilty. Sillah v. State, 291 Ga. App. 848, 663 S.E.2d 274 (2008).

Defendant did not show that trial counsel was ineffective for not requesting certain charges as these would have been inconsistent with the defendant's "mere presence" defense. Thus, the trial court properly found that this was a strategic decision made in the exercise of reasonable professional judgment. Whitley v. State, 293 Ga. App. 605, 667 S.E.2d 447 (2008).

Counsel's failure to seek severance of the defendant's trial from that of the driver of a car in which drugs were found did not constitute ineffective assistance. Trial counsel testified that counsel wanted the driver in the case so that counsel could "blame the drugs on" the driver, and this strategic decision did not constitute deficient performance. Gresham v. State, 295 Ga. App. 449, 671 S.E.2d 917 (2009).

Trial counsel was not ineffective for failing to object to the admission into evidence of a video statement by a witness because the defense wished the jury to view the witness's statement, and counsel did not believe that the defense would be successful in attempting to admit into evidence only certain portions of the statement; that was a matter of trial strategy and tactics, which had not been shown to be unreasonable so as to form a basis for a claim of counsel's ineffectiveness. Nations v. State, 290 Ga. 39, 717 S.E.2d 634 (2011).

Defendant's claim of ineffective assistance of trial counsel lacked merit because trial counsel's strategy and tactics, including refraining from objecting to certain hearsay statements, were reasonable and the defendant failed to overcome the strong presumption that counsel's conduct falls within the broad range of reasonable professional conduct. Green v. State, 291 Ga. 579, 731 S.E.2d 359 (2012).

Withdrawal of request to charge on justification. — In a malice murder trial, trial counsel, who relied on a defense of lack of malicious intent, was not ineffective for withdrawing a request to charge on justification. Self-defense was supported by only slight evidence at best, and such a defense might have risked alienating the jury; moreover, defense counsel reasonably concluded that if the defendant sought a charge on self-defense, the state would request a charge on voluntary manslaughter. Muller v. State, 284 Ga. 70, 663 S.E.2d 206 (2008).

Failure to request certain instructions.

Defendant's contention on appeal that defense counsel was ineffective for failing to timely request a charge on bare suspicion or to object to the trial court's refusal to give the charge once requested failed because defendant was not entitled to such a charge. Additionally, the charges that the trial court gave on presumption of innocence and reasonable doubt embodied all the elements of a bare suspicion charge, rendering such a charge unnecessary. Range v. State, 289 Ga. App. 727, 658 S.E.2d 245 (2008).

Defendant's contention on appeal that defense counsel was ineffective for failing to timely request a charge on bare suspicion or to object to the trial court's refusal to give the charge once requested failed because defendant was not entitled to such a charge. Additionally, the charges that the trial court gave on presumption of innocence and reasonable doubt embodied all the elements of a bare suspicion charge, rendering such a charge unnecessary. Range v. State, 289 Ga. App. 727, 658 S.E.2d 245 (2008).

Evidence was insufficient to establish a reasonable probability that the jury would have found defendant guilty of voluntary

manslaughter and thus trial counsel was not ineffective in requesting this instruction since the evidence demonstrated that the victim and defendant were in rival gangs; that the victim and others drove into an apartment complex to pick up a friend; that an occupant in the victim's vehicle poked a gun out of a window; and that defendant and the defendant's codefendant shot at the vehicle, killing the victim and wounding others. Hung v. State, 284 Ga. 796, 671 S.E.2d 811 (2009).

Trial court did not err by denying a defendant's motion for a new trial based on the defendant's contention that the defendant received ineffective assistance of counsel regarding convictions for aggravated sexual battery and child molestation involving the defendant's eight-year-old child, since despite trial counsel acknowledging that trial counsel failed to move for a mistrial or request a curative instruction after the state questioned the defendant about a prior act of sodomy on a 14-year-old, trial counsel's objection to the evidence was sustained. Thus, the jury heard no evidence concerning the circumstances giving rise to the sodomy charge and, further, heard no evidence refuting or contradicting the defendant's testimony that the defendant was acquitted of that charge. Dyer v. State, 295 Ga. App. 495, 672 S.E.2d 462 (2009).

Prior inconsistent statement of a witness who took the stand and who was subject to cross-examination was admissible as substantive evidence. Thus, because the defendant, who testified at trial, was not entitled to a limiting instruction as to the use of the defendant's prior inconsistent statements, counsel was not ineffective for failing to request the instruction; likewise, the defendant's claim that counsel was ineffective for failing to object to the state's closing argument telling the jurors that the jurors could consider this testimony as substantive evidence also failed. Gregory v. State, 297 Ga. App. 245, 676 S.E.2d 856 (2009).

There was no ineffectiveness of the defendant's counsel for failing to request a jury charge on entrapment with respect to a charge of making false statements as there was no evidence that a state agent originated the idea for making a false statement. Harvill v. State, 296 Ga. App. 453, 674 S.E.2d 659 (2009).

As the defendant was not convicted of the charged offense of aggravated stalking, there was no ineffectiveness by counsel's failure to seek a directed verdict on that charge due to lack of evidence because the defendant could not show any harm therefrom; further, the trial court was authorized to charge the jury on the lesser-included offense of stalking, in violation of O.C.G.A. § 16-5-90(a)(1), based on the trial court's discretion. Harvill v. State, 296 Ga. App. 453, 674 S.E.2d 659 (2009).

In a defendant's criminal prosecution for, inter alia, felony murder, defense counsel was not ineffective for failing to request a jury charge on a witness testifying pursuant to a grant of immunity because the witness at issue was never charged, arrested, or prosecuted as to the events forming the basis of the instant case. Watkins v. State, 285 Ga. 107, 674 S.E.2d 275 (2009).

Trial counsel was not ineffective by failing to request a limiting instruction regarding the jury's consideration of evidence of the defendant's prior felony convictions because assuming deficient performance in the failure to request a limiting instruction, the defendant did not establish prejudice therefrom; the defendant failed to show that the outcome of defendant's trial would have been different had the jury been told the jury was to consider the prior convictions only for the purposes of establishing the predicate offenses of the counts in which the convictions were described. Higginbotham v. State, 287 Ga. 187, 695 S.E.2d 210 (2010).

Trial counsel was not ineffective for failing to request a jury charge on immunity granted to a witness because the transcript revealed that the witness was questioned regarding the grant of immunity and was thoroughly cross-examined regarding the witness's motives for testifying; that questioning and the general jury instructions on witness credibility that were given were sufficient to apprise the jury of any negative inferences the jury could draw from the immunity arrangement involving this witness. Dockery v. State, 287 Ga. 275, 695 S.E.2d 599 (2010).

Trial counsel was ineffective for failing to object to the prosecutor's characterization of the defendant as a "thug" during closing argument because the prosecution was afforded wide latitude in closing argument, and the characterization was based on reasonable inferences drawn from the evidence. Dockery v. State, 287 Ga. 275, 695 S.E.2d 599 (2010).

Failure to request jury charge on proximate causation. — Trial counsel was not ineffective for failing to request a jury charge on proximate causation as the jury charge was sufficient to inform the jury that, in order to convict the defendant of felony murder, the jury had to determine that the defendant caused or was a party with the codefendant in causing the victim's death during the escape phase of the underlying felonies. Pennie v. State, 292 Ga. 249, 736 S.E.2d 433 (2013).

Failure to request lesser-included offense instruction.

Defendant failed to establish that defendant received ineffective assistance of counsel because trial counsel erroneously acceded to a simple assault charge and failed to request a jury charge on battery because the jury's finding of guilt on aggravated assault necessarily required a finding that defendant used defendant's hands in a way that did or was likely to result in serious bodily injury, which required the jury to reject the opportunity to find mere violent injury, which would have been the basis for a simple assault. Accordingly, the trial court was authorized to find that defendant failed to meet the burden to show that defendant's defense was so prejudiced that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Armstrong v. State, 292 Ga. App. 145, 664 S.E.2d 242 (2008).

Because trial counsel made a reasonable decision to pursue an all-or-nothing defense strategy based on counsel's review of the evidence, the appellate court found no merit in the defendant's claim that trial counsel provided ineffective assistance due to counsel's failure to request a charge on misdemeanor obstruction as a lesser included offense of felony obstruction of an officer. Ingram v. State, 317 Ga. App. 606, 732 S.E.2d 456 (2012).

Failure to object to pre-trial instruction. — Trial court did not err in finding that trial counsel were not deficient in failing to object to a pre-trial instruction that was given to the jury pool because the pre-trial instruction was proper, and trial counsel found it advantageous; the pre-trial charge, as a whole, did not shift the burden of proof to the defendant, and one of the defendant's trial counsel testified that counsel believed that the defendant actually benefitted from the instruction because it sounded as if it were in defendant's favor and that the giving of the instruction aided the defendant in effectively questioning the jurors regarding their viewpoints on the law during voir dire. Bridges v. State, 286 Ga. 535, 690 S.E.2d 136 (2010).

Failure to argue rule of completeness. — Defendant failed to show that trial counsel was ineffective by not arguing the rule of completeness, former O.C.G.A. § 24-3-38 (see now O.C.G.A. § 24-8-822), as a means to get the defendant's entire post-stabbing statement into evidence because there were discrepancies between the defendant's trial testimony and the account of a witness regarding a statement the defendant allegedly made on the night of the stabbing; therefore, an acquittal would not likely have resulted had the jury heard the witness's testimony in its entirety. Carruth v. State, 290 Ga. 342, 721 S.E.2d 80 (2012).

Withdrawing by counsel on instruction on self defense or accident. — Trial counsel was not ineffective for withdrawing jury instructions on the defenses of accident and self-defense because no evidence was elicited at trial that would support a defense of accident or self-defense. Jones v. State, 287 Ga. 770, 700 S.E.2d 350 (2010).

Test with regard to guilty plea.

Defendant failed to show that defendant received ineffective assistance of counsel with regard to being coerced or deceived by counsel as to length of sentence that could be imposed, and trial court did not err by denying defendant's motion to withdraw guilty plea entered into, because record did not support defendant's claim that counsel deceived him about the length of the sentence as defen-

dant was advised of the maximum possible sentence and was told that there was no guarantee as to length of sentence that would be imposed. Brantley v. State, 290 Ga. App. 764, 660 S.E.2d 846 (2008).

It was error to deny an inmate's habeas petition when the only evidence of record, the inmate's affidavit, indicated that counsel gave erroneous advice that adversely affected the decision of the inmate, who entered into a negotiated plea, not to go to trial. Without a finding that counsel gave proper advice or that the inmate lacked credibility, the evidence did not support the conclusion that counsel was not deficient. Garrett v. State, 284 Ga. 31, 663 S.E.2d 153 (2008).

With regard to defendant's conviction for pimping, defendant failed to establish that defendant was rendered ineffective assistance of counsel as a result of defense counsel allegedly failing to advise defendant as to the consequences of a guilty plea as defendant failed to show how further consultation with defense counsel would have impacted the decision to enter a guilty plea and defendant failed to show how, but for counsel's performance, defendant would not have pled guilty and proceeded to trial. Burroughs v. State, 292 Ga. App. 580, 665 S.E.2d 4 (2008), cert. denied, No. S08C1930, 2008 Ga. LEXIS 930 (Ga. 2008).

Where a defendant contends that the defendant went to trial instead of pleading guilty because of counsel's deficient representation, the defendant is entitled to relief if there is at least an inference from the evidence that the defendant would have accepted a plea. However, simply because such an inference can be drawn even where the evidence is disputed or unclear on this question does not mean that a trial court is required to do so in cases where the evidence is disputed. Cleveland v. State, 285 Ga. 142, 674 S.E.2d 289 (2009).

Defendant failed to show that the defendant's plea counsel was ineffective for affirming the trial court's incorrect statement of the law as to the minimum sentence applicable to the defendant's child molestation plea because the defendant failed to show that the defendant would have pled not guilty and gone to trial had the defendant known the true minimum was five years, pursuant to O.C.G.A. § 16-6-4. Roseborough v. State, 311 Ga. App. 456, 716 S.E.2d 530 (2011).

Defendant's allegations of ineffective assistance of counsel failed because the court credited trial counsel's testimony that trial counsel fully explained the evidence and the strength of the state's case to the defendant, conveyed all plea bargain offers from the state to the defendant, and the defendant rejected those offers. Butler v. State, 319 Ga. App. 350, 734 S.E.2d 567 (2012).

Counsel's ineffectiveness in dealing with defendant's competency issues. — Habeas court's order denying the petitioner's claim that the petitioner was entitled to a new sentencing trial was reversed and the petitioner's death sentence was vacated because trial counsel performed deficiently by failing to sufficiently develop mitigating evidence from non-experts, and there was a reasonable probability that the jury would have reached a different outcome in the sentencing phase of the petitioner's trial if the additional evidence habeas counsel obtained had been presented at trial; trial counsel failed to fully investigate whether the petitioner had suffered one or more brain injuries prior to the petitioner's crimes, and unduly limiting counsel's interviews of the petitioner's family and friends to an unreasonably narrow range of persons, and there was additional evidence from non-experts concerning the petitioner's traumatic childhood and the petitioner's change in behavior and apparent mental distress following two head injuries. Perkins v. Hall, 288 Ga. 810, 708 S.E.2d 335 (2011).

In context of challenge to guilty plea, etc.

Trial court properly denied the defendant's motion to withdraw the defendant's guilty plea based on ineffective assistance under the Sixth Amendment. The record showed that trial counsel, who obtained discovery materials, investigated the case, spoke to the victim and other eyewitnesses, and met with the defendant, was adequately prepared to try the case; moreover, the defendant did not show that additional trial preparation would likely

have changed reasonable counsel's advice regarding the guilty plea or the outcome of a trial. Hammett v. State, 297 Ga. App. 235, 676 S.E.2d 880 (2009).

Defendant, who sought to withdraw an Alford plea, did not show that the defendant misunderstood the state's recommendation concerning credit for time served or that counsel failed to listen to the defendant, much less that the defendant would have insisted on going to trial had the defendant been counseled properly. Thus, the defendant failed to prove that plea counsel was ineffective on this ground. Skinner v. State, 297 Ga. App. 828, 678 S.E.2d 526 (2009).

Trial court properly denied a defendant's motion to withdraw a guilty plea to voluntary manslaughter. Pretermitting whether counsel's performance was deficient, the defendant failed to establish a reasonable probability that the defendant would have insisted on a trial if the defendant had always known the defendant could be sentenced to serve 15 years instead of ten years; furthermore, the defendant would have been tried for felony murder had the defendant gone to trial. Johnson v. State, 298 Ga. App. 197, 679 S.E.2d 763 (2009).

Defendant failed to show deficient performance on the part of defense counsel as defense counsel testified defense counsel correctly advised the defendant that the defendant would not be eligible for parole until the defendant served 30 years of the life sentence and did not tell the defendant that the defendant could withdraw the plea at any time, testimony which the trial court credited. Arnold v. State, 292 Ga. 95, 734 S.E.2d 382 (2012).

Plea deals.

Defendant failed to establish that defendant received ineffective assistance of trial counsel with regard to defendant's drug-related convictions as, although defendant successfully met the burden of showing that defense counsel's representation fell below an objective standard of reasonableness due to defense counsel failing to advise defendant about all of the evidence in the state's case against defendant due to defense counsel failing to examine the state's open file, defendant failed to establish but for defense counsel's unprofessional errors, the result of the proceeding would have been different, namely that defendant would not have accepted the state's plea offer. Cleveland v. State, 290 Ga. App. 835, 660 S.E.2d 777 (2008).

Trial court properly denied defendant's motion to withdraw defendant's guilty plea to possession of cocaine and possession of tools for the commission of a crime charges as defendant failed to show that the plea was not knowingly, intelligently, and voluntarily entered as the colloquy of the trial court indicated that defendant was properly questioned and that defendant's responses established that the plea and circumstances were understood and that defendant was satisfied with trial counsel. Further, the defendant failed to establish that defendant was rendered ineffective assistance of counsel based on trial counsel purportedly not explaining that the state was incapable of meeting its burden on a trafficking charge, causing defendant to believe that the reduced charges were a part of a negotiated plea agreement, as defendant testified that defendant informed trial counsel that defendant would take a plea if the trafficking offense was reduced. Franklin v. State, 291 Ga. App. 267, 661 S.E.2d 870 (2008).

Habeas corpus petitioner failed to prove that trial counsel's performance was professionally deficient because trial counsel did not fail in the duty to offer the petitioner informed advice regarding the state's plea agreement offer; the petitioner admitted that the petitioner never told trial counsel that the petitioner wished to plead guilty, and trial counsel did not act in an unreasonable or professionally deficient manner in concluding that the petitioner had decided to let the petitioner's father speak for the petitioner and wished to reject the state's offer. Cammer v. Walker, 290 Ga. 251, 719 S.E.2d 437 (2011).

Inexperience does not constitute ineffectiveness, etc.

Claim that trial counsel was ineffective due to inexperience failed, as during the three years counsel practice law, counsel's practice was almost exclusively criminal defense, counsel had tried 16 cases, and co-counsel had been practicing law for

approximately 18 years at the time of trial and had handled about 10 criminal jury trial. Simmons v. State, 291 Ga. 705, 733 S.E.2d 280 (2012).

Inadequate preparation of counsel, etc.

There was no merit to the defendant's argument that because counsel did not have time to prepare for trial, the defendant had experienced a constructive denial of counsel under the Sixth Amendment. Counsel was already familiar with the case when counsel took it over from an attorney whom counsel supervised; counsel had access to the trial preparation work done by the original attorney; counsel met with the defendant before trial; and counsel indicated to the trial court that counsel was ready to proceed to trial. Crane v. State, 294 Ga. App. 321, 670 S.E.2d 123 (2008).

Claim that counsel performed deficiently by failing to adequately prepare for trial and failing to investigate potential witnesses failed because two of the witnesses the defendant claimed should have been interviewed testified at trial and a third was interviewed but it was determined that the third witness's testimony would not have established an alibi defense. Griffin v. State, 292 Ga. 321, 737 S.E.2d 682 (2013).

Significant misleading statements of counsel, etc.

Defendant failed to demonstrate that trial counsel rendered ineffective assistance by mistakenly referring to the night of the murder as August 30 rather than September 1, 2006 during the direct examination of the host of a barbecue because the transcript of defense counsel's complete questioning of the host and the host's responsive testimony made clear that both were operating under the premise that the event of the barbecue took place on the day of the murder, which was unquestionably September 1, 2006, and thus, the jury was aware that the host was testifying in an attempt to establish an alibi for the defendant; there was not a reasonable probability that, but for counsel's mistake, the outcome of the defendant's trial would have been different because it was plain that the host was testifying about the night of the murder, and the host's testimony fell well short of establishing an alibi for the defendant for other reasons. Smiley v. State, 288 Ga. 635, 706 S.E.2d 425 (2011).

Counsel's decision not to seek suppression of evidence.

Defense counsel was not ineffective for not seeking to suppress the evidence seized in the search of the defendant's home based upon the alleged insufficiency of the search warrant affidavit; there was no showing that the information in support of the warrant was patently false or that there was any intent to misled the judge in seeking the search warrant. Bryant v. State, 282 Ga. 631, 651 S.E.2d 718 (2007).

Trial counsel did not perform deficiently by failing to renew the motion to suppress after evidence was presented at trial because there was no evidence that a renewed motion would have been granted or that the defendant suffered prejudice as a result of counsel's performance. Gibson v. State, 290 Ga. 6, 717 S.E.2d 447 (2011).

Defendant's required showing of deficient performance prejudicing defense.

With regard to a defendant's conviction for armed robbery and other crimes, the defendant failed to establish ineffective assistance of counsel from failure to: (1) adequately prepare the defendant for trial; (2) keep the defendant adequately updated with respect to issues relevant to the defense; and (3) discuss post-trial motions; the defendant failed to meet the burden of proving that any such alleged deficiency prejudiced the defendant in any manner. Defense counsel's failure to file a written motion to sever would have been pointless, as the trial court had considered the defense's oral motion; there was no evidence in the record that other witnesses existed that could have been called on the defendant's behalf; and trial counsel did not represent the defendant with regard to the defendant's motion for a new trial, therefore, the alleged failure of trial counsel to prepare the defendant for the motion for new trial hearing could not have constituted ineffective assistance of counsel. Grant v. State, 289 Ga. App. 230, 656 S.E.2d 873 (2008).

Defendant's refusal to cooperate.

Defendant failed to make a case for the ineffective assistance of trial counsel because trial counsel could hardly be found to be deficient for not considering the defendant as a key witness in the defendant's own defense and for having to move forward with defendant's defense without the defendant's cooperation; trial counsel testified that counsel went to the jail to visit the defendant perhaps two or three times and then ceased to do so because the defendant refused to answer most of counsel's questions, would not give counsel defendant's version of events, would not help with the defense, and told counsel that the defendant did not want to talk to counsel. Sanford v. State, 287 Ga. 351, 695 S.E.2d 579 (2010), cert. denied, 131 S. Ct. 1514, 179 L. Ed. 2d 336 (2011).

Advisement of the right not to testify.

Defense counsel was not ineffective for interfering with the defendant's right to testify at trial as: (1) counsel informed the defendant that, although the defendant had an absolute right to testify, counsel believed that it was in the defendant's interest not to testify for strategic reasons; and (2) based on the reasonable advice of counsel, the defendant voluntarily chose not to testify. Dixon v. State, 285 Ga. 312, 677 S.E.2d 76 (2009), overruled on other grounds, 287 Ga. 242, 695 S.E.2d 255 (2010).

Although defendant's three attorneys disagreed as to whether defendant should testify at trial, the attorneys presented their advice to defendant, and defendant made the decision not to testify; consequently, the attorney's advice did not in any way violate defendant's Sixth Amendment right to effective counsel. Spencer v. State, 287 Ga. 434, 696 S.E.2d 617 (2010).

Trial counsel was not ineffective for advising the defendant not to testify because the defendant acknowledged that counsel told the defendant that the defendant would cause more damage to the defendant's case if the defendant testified and acknowledged trusting counsel thereby choosing not to testify; even assuming that trial counsel did advise the defendant that the defendant could be impeached by certain evidence and that such advise was incorrect, the defendant did not show that the defendant was prejudiced thereby because the defendant never said what the defendant's testimony would have been had the defendant testified at trial. Johnson v. State, 290 Ga. 382, 721 S.E.2d 851 (2012).

Failure to call defendant to testify. — Trial counsel did not render ineffective assistance by failing to call the defendant to testify because the defendant made the decision not to testify with a complete understanding of the defendant's rights, and trial counsel testified that counsel advised the defendant that it was up to the defendant whether to testify and that counsel advised against given the defendant's prior felony convictions and belief that the testimony the defendant wished to present was, to a certain extent, contrary to the defense theory. Thornton v. State, 292 Ga. 796, 741 S.E.2d 641 (2013).

Prejudice must be shown.

Trial counsel was not ineffective as: (1) the defendant failed to support an assertion that trial counsel was ineffective in failing to listen to an audiotape of the defendant's second interview with the Georgia Bureau of Investigation prior to trial; (2) counsel's off-hand comment as to hindsight was insufficient to support an inference of deficient performance; and (3) the defendant failed to show that prejudice resulted from counsel's alleged deficiency. Sturgis v. State, 282 Ga. 88, 646 S.E.2d 233 (2007).

Even if trial counsel was ineffective for failing to challenge the jury array on the basis that the array was tainted by the comments of a juror who was excused after stating that the juror thought the defendant was "guilty in 2003," when the crimes occurred, there was no prejudice because the juror's opinion was based solely on media reports, not on any personal knowledge of the defendant; where a prospective juror's comments did not link a defendant with criminal activity, or characterize the defendant as a criminal, the entire jury panel did not have to be excused. Edwards v. State, 282 Ga. 259, 646 S.E.2d 663 (2007).

Because there was significant evidence refuting the defendant's claim of self-defense, the defendant had not shown prejudice even if trial counsel was defi-

cient for failing to object to the prosecutor's comment on the defendant's silence, for failing to object to the prosecutor's comment in opening about the evidence the defendant was anticipated to present at trial, and for failing to object to an alleged "golden rule" argument. Jackson v. State, 282 Ga. 494, 651 S.E.2d 702 (2007).

Because a felony murder conviction merged with a malice murder conviction, the defendant had not shown prejudice from trial counsel's failure to object to the felony murder jury charge; furthermore, defendant had not shown prejudice by the making of a statement that was not introduced at trial. John v. State, 282 Ga. 792, 653 S.E.2d 435 (2007).

Defendant argued that defense counsel was ineffective in cross-examining a state's witness and in failing to call a witness to undermine the testimony of the state's witness. The defendant failed to show prejudice; as eyewitnesses testified that the defendant ordered an aggravated assault on the victim and assisted in murdering the victim, any deficiencies of counsel were unlikely to have affected the verdict. Wilcox v. State, 284 Ga. 414, 667 S.E.2d 603 (2008).

Because the defendant did not show that there was a reasonable probability that the outcome would have been different if counsel had objected to a reference to a codefendant's guilty plea during the state's opening, the court did not have to determine whether counsel was deficient; furthermore, the jury was charged that opening statements were not evidence. Wilcox v. State, 297 Ga. App. 201, 677 S.E.2d 142 (2009), cert. denied, No. S09C1285, 2009 Ga. LEXIS 342 (Ga. 2009).

Defendant's claim of ineffective assistance of counsel failed because the defendant pointed to no change in the law or facts or loss of material evidence that would have raised a reasonable probability that the outcome of the appeal would have been different but for the counsel's delay in pursuing a motion for a new trial. Simmons v. State, 291 Ga. 664, 732 S.E.2d 65 (2012).

Necessity of showing of prejudice and disadvantage from counsel's ineffectiveness.

Defendant could not establish that defendant's trial counsel was deficient for failing to object to inadmissible evidence concerning other bad acts because trial counsel objected to the admission of the evidence and obtained a ruling from the trial court, and regardless of the format of trial counsel's objections, the allegations were made with sufficient specificity for the trial court to identify their precise basis since they specifically pointed out how the proposed evidence violated some established rule of evidence or procedure; even if counsel's performance was deficient, the defendant did not show there was a reasonable probability that the outcome of the trial would have been different but for counsel's purported omission because there was overwhelming evidence of the defendant's guilt. Ellis v. State, 287 Ga. 170, 695 S.E.2d 35 (2010).

Trial counsel's deficient performance in failing to object to a jury charge was not prejudicial because the trial court admitted having erred and went on to conclude that the error was harmless in light of the overwhelming evidence of the defendant's guilt. Higginbotham v. State, 287 Ga. 187, 695 S.E.2d 210 (2010).

Insufficient showing of prejudice on issue of defendant's silence. — Defendant's claim that trial counsel rendered ineffective assistance not objecting to pervasive comments on the defendant's pre-arrest silence failed because the defendant made an insufficient showing of prejudice; there was strong evidence of the defendant's guilt of felony murder, including that it was undisputed that the defendant was the only adult caring for the victim when the victim received mortal injuries and that the defense that the victim fell from the bed was not supported by the medical evidence. Whitaker v. State, 291 Ga. 139, 728 S.E.2d 209 (2012).

Suppression of identification.

With regard to a defendant's convictions for child molestation, the trial court properly denied the defendant's motion for a new trial as the defendant failed to show that the defendant was rendered ineffective assistance of counsel as a result of

trial counsel failing to move to suppress the photographic lineup evidence wherein the two victims identified the defendant as the perpetrator. The reviewing court agreed with the trial court that the photographic lineup was not impermissibly suggestive since the lineup depicted six black and white photographs of men of similar race, age, hairstyle, and complexion; thus, the defendant failed to prove that there would have been any merit to the motion to suppress. Mohammed v. State, 295 Ga. App. 514, 672 S.E.2d 483 (2009).

Defendant failed to show that trial counsel was ineffective by failing to move to suppress identification evidence and testimony because the admission of a deceased victim's identification statement was made the subject of a motion in limine filed by trial counsel and, thus, there could be no error as counsel did not fail to seek the exclusion of the admission of the victim's identification; the victims' identification of the defendant was merely one of the credibility of eyewitnesses to the incident, which had to be resolved by the trier of fact. Gandy v. State, 290 Ga. 166, 718 S.E.2d 287 (2011).

Witness testifying to defendant's gang involvement was not ineffective assistance. — Defendant did not receive ineffective assistance of counsel due to trial counsel's failure to object when a witness testified that the defendant spent time with an alleged gang because there was no prejudice in light of the overwhelming evidence of the defendant's guilt; several other eyewitnesses testified that the defendant shot the victim, and the defendant failed to show that but for counsel's failure to object, the outcome of the trial would have been any different. Kitchens v. State, 289 Ga. 242, 710 S.E.2d 551 (2011).

Suspension from practice of law.

Trial counsel's failure to disclose to the defendant a previous six-month suspension from the practice of law did not support a finding of ineffective assistance because the suspension occurred more than 13 years earlier and concerned the handling of trust accounts that were unrelated to representation of criminal defendants. Durham v. State, 292 Ga. 239, 734 S.E.2d 377 (2012).

Initiation of statement by defendant. — Trial court did not err in failing to suppress a statement the defendant made to the police because the statement was made during the course of a subsequent interview that the defendant initiated and was admissible; the defendant contacted the case detective and requested a meeting, the detective met with the defendant and again advised the defendant of the defendant's right to counsel, and the defendant waived the defendant's right to counsel and made an incriminating statement. Haynes v. State, 287 Ga. 202, 695 S.E.2d 219 (2010).

Failure to object to limitations on voir dire. — Trial counsel was not ineffective for failing to object to limitations on voir dire because the defendant was nevertheless able to adequately explore any inclination or bias that might have derived from strong feelings that prospective jurors had about individuals involved in the sale of illegal drugs. Ellis v. State, 292 Ga. 276, 736 S.E.2d 412 (2013).

Failure to challenge jury array.

Assuming defense counsel's performance was deficient during defendant's trial for aggravated assault and criminal trespass for failing to object to the trial court's failure to ask the qualifying voir dire questions that are required by O.C.G.A. § 15-12-164(a), defendant failed to show that the outcome of the trial would have been different had the trial court asked the statutory questions as the prosecutor asked the potential jurors whether they were acquainted with the defendant or the victim, and if so, whether they could remain impartial. Since the potential jurors indicated no bias and defendant did not contend that any juror was, in fact, biased or prejudiced, defendant failed to show ineffective assistance of trial counsel. Burnette v. State, 291 Ga. App. 504, 662 S.E.2d 272 (2008).

Failure to challenge juror for cause. — Defendant did not overcome the strong presumption that trial counsel's failure to seek a juror's removal for cause constituted reasonable professional assistance because the defendant did not question trial counsel at the motion for a new trial hearing about counsel's decision-making with regard to this issue,

and the trial transcript showed that the juror did not meet the qualification for dismissal for cause. Higginbotham v. State, 287 Ga. 187, 695 S.E.2d 210 (2010).

Trial counsel was not ineffective for failing to move to strike three prospective jurors for cause, all of whom said the jurors had strong feelings about individuals involved in the sale of illegal drugs, because the jurors all indicated the jurors could try to judge the case based upon the court's instructions and the evidence. Ellis v. State, 292 Ga. 276, 736 S.E.2d 412 (2013).

Trial counsel was not ineffective for failing to move to strike for cause a former FBI agent, who had spent nine years assigned to a bank robbery squad and had been a victim in a pending armed robbery prosecution for which the district attorney prosecuting the defendant was responsible, as the prospective juror said that the prospective juror could be fair and impartial. Ellis v. State, 292 Ga. 276, 736 S.E.2d 412 (2013).

Allowing sentencing sheet to go to jury room. — Any error by counsel in allowing the sentencing sheet for similar transaction evidence to go out with the jury was harmless as the evidence of guilt was overwhelming. Gregory v. State, 297 Ga. App. 245, 676 S.E.2d 856 (2009).

Failure to ensure defendant's presence at an in-chamber hearing. — With regard to a defendant's conviction for malice murder, the trial court properly denied the defendant's motion for a new trial based on a claim that trial counsel was ineffective for failing to object to a juror remaining on the panel after a brief encounter with one of the state's witnesses and the failure to insist that defendant be allowed to personally participate in the in-chambers hearing on the issue. The decision to allow the juror to remain on the panel was a reasonable tactical decision made after a hearing was held on the issue and no harm was established by the defendant not being present during the in-chambers hearing on the issue as a result of the overwhelming evidence of the defendant's guilt. Peterson v. State, 284 Ga. 275, 663 S.E.2d 164 (2008).

Counsel fully investigated case. — Defendant failed to meet the defendant's burden of proving deficient performance on the ground that defendant's trial counsel failed to investigate an additional suspect because counsel testified that counsel investigated every person who could have been connected to the case and that counsel also investigated relevant phone records and police files that could have revealed other suspects in the victim's murder; despite counsel's efforts, counsel was unable to connect any additional suspect to the shooting. Jennings v. State, 288 Ga. 120, 702 S.E.2d 151 (2010).

Failure to research or investigate.

Defendant was not entitled to a new trial based on counsel's ineffectiveness because defendant gave counsel no information (in support of defendant's self-defense claim) to conduct an investigation of the victims' alleged prior violent acts. Moreno-Rivera v. State, 291 Ga. 336, 729 S.E.2d 366 (2012).

Defendant's claim of ineffective assistance of counsel failed because the defendant offered no evidence to prove that if counsel had conducted more investigation counsel would have discovered evidence favorable to the defense. Zamora v. State, 291 Ga. 512, 731 S.E.2d 658 (2012).

Criminal Procedure Discovery Act constitutional.

Discovery requirements of O.C.G.A. § 17-16-4 relating to the presentence hearing did not violate a defendant's right to effective assistance of counsel; counsel may freely investigate for mitigating evidence, knowing that the identity of any potentially harmful witness resulting from that investigation need only be produced to the state in reciprocal discovery should the defense decide to call that witness at the presentence hearing. Muhammad v. State, 282 Ga. 247, 647 S.E.2d 560 (2007).

Time spent with client. — Defendant failed to establish that trial counsel rendered ineffective assistance by failing to confer meaningfully with the defendant because the defendant did not specifically describe how additional communications with counsel could have changed the outcome of the trial; there exists no magic amount of time which counsel must spend in actual conference with a client. Glass v. State, 289 Ga. 542, 712 S.E.2d 851 (2011).

Failure to pursue sleepwalking defense. — Trial counsel was not ineffective for failing to assert a sleepwalking defense since the decision was based on counsel's belief that the jury was more likely to believe a defense based on the accidental discharge of a defective weapon. Smith v. State, 292 Ga. 620, 740 S.E.2d 158 (2013).

Failure to obtain evidence. — Since both the defendant and the ex-wife testified that they had a phone conversation on the day of the stalking and burglary incident, but disagreed as to what was said in the conversation, and the defendant's cell phone records would not have reflected the substance of the conversation, the admission of the records would have had no impact on the issue of credibility, and the failure of defense counsel to obtain the phone records did not amount to ineffective assistance. Bray v. State, 294 Ga. App. 562, 669 S.E.2d 509 (2008).

Failure to introduce evidence. — Although the defendant claimed that the defense attorney failed to introduce evidence that would have allowed the jury to understand the reasonable nature of the defendant's allegedly fearful state of mind with regard to the shooting victim, the defendant's attorney was able to elicit testimony from the defendant about the defendant's belief that the victim was dangerous. Therefore, the defendant did not prevail on the defendant's ineffective assistance of counsel claim because the defendant could not show that a reasonable probability existed that, but for counsel's errors in allegedly failing to introduce the evidence, the outcome at trial would have been more favorable. Render v. State, 288 Ga. 420, 704 S.E.2d 767 (2011).

Failure to object to appointment of magistrate. — Defendant failed to meet the burden of establishing that defendant was rendered ineffective assistance of counsel for trial counsel's failure to object to the alleged improper appointment of a chief magistrate who presided over the trial, sitting by designation following a request for judicial assistance by the superior court judge assigned to the case, since defendant failed to show that defendant was denied a fair trial by virtue of the appointment. Further, trial counsel testified at defendant's hearing on a motion for a new trial that trial counsel thought it would benefit defendant to have the particular magistrate preside over the trial rather than a superior court judge, which established that the failure to object to the appointment was a matter of trial strategy or tactics, which was not a basis for an ineffective assistance of counsel claim. Mazza v. State, 292 Ga. App. 168, 664 S.E.2d 548 (2008).

Failure to object to compliance with rules. — Trial counsel was not ineffective for failing to object to the state's failure to comply with Ga. Unif. Super. Ct. R. 31.1 and 31.3 as the detective's testimony regarding the fact that the defendant, an accomplice, and the victim were suspected of murdering the victim's husband, was admissible as relevant to the defendant's motive to kill the victim. Goodman v. State, 293 Ga. 80, 742 S.E.2d 719 (2013).

Failure to object to identification of defendant. — Defendant failed to show that the defendant received ineffective assistance of counsel by failing to object to an in-court identification of the defendant by the aggravated assault victim because the defendant neither asked trial counsel why no objection was made to the in-court identification nor made any showing that the identification would have been suppressed had an objection been made; the defendant made no affirmative showing that the purported deficiency in counsel's representation was indicative of ineffectiveness as opposed to being an example of a conscious, deliberate, and reasonable trial strategy. Newsome v. State, 288 Ga. 647, 706 S.E.2d 436 (2011).

Failure to object to police officer's testimony. — Trial counsel was not deficient for failing to object to police officers' testimony regarding the defendant's arrest because there could have been no prejudice to the defendant by the testimony; there was ample and undisputed evidence that the defendant had consumed a substantial amount of alcohol prior to the shooting and the defendant's flight from the crime scene. Nations v. State, 290 Ga. 39, 717 S.E.2d 634 (2011).

Failure to object to testimony of GBI agent. — Trial counsel was not ineff-

fective for failing to object to the testimony of a GBI Agent because counsel made a strategic decision not to object to the testimony, and that strategy was reasonable. Wheeler v. State, 290 Ga. 817, 725 S.E.2d 580 (2012).

Trial counsel was not ineffective for failing to object to the victim's brother's testimony on the ground that the state failed to put the brother on the witness list as required by O.C.G.A. § 17-16-3 because the defendant failed to show that if counsel had objected the outcome of the trial would have been different; the defendant offered no evidence at the motion for new trial hearing to show how the defendant could have benefitted from a continuance before the brother was permitted to testify; or that the state acted in bad faith in leaving the brother off the witness list. Charleston v. State, 292 Ga. 678, 743 S.E.2d 1 (2013).

Failure to object to charge on transferred intent. — Trial counsel performed deficiently by failing to object to the giving of a charge on transferred intent and the prosecutor's closing argument addressing the inapplicable principles of transferred intent because the charge was not adjusted to the evidence since there was no evidence that the defendant was intending to shoot any other person when the defendant shot the victim so as to bring the case within the typical "innocent bystander" scenario in which the doctrine of transferred intent was applied; however, in light of the overwhelming evidence of the defendant's guilt, it was highly probable that the charge did not contribute to the verdict, and the defendant failed to show the requisite prejudice in that there was no reasonable probability that the outcome of the trial would have been different had trial counsel objected to the prosecutor's argument and the trial court's charge. Boatright v. State, 289 Ga. 597, 713 S.E.2d 829 (2011).

Failure of counsel to request a continuance.

Trial counsel was not ineffective for failing to request a continuance to review evidence and have the evidence tested by the defendant's own expert because the defendant presented no evidence at the motion for new trial hearing to support the defendant's bald assertion that there was a reasonable probability that the outcome of the proceeding would have been different had counsel sought a continuance or independent expert testing; even assuming that the defendant could properly raise a claim of ineffectiveness against counsel, the trial court did not err in denying the motion for new trial on that ground. Walker v. State, 288 Ga. 174, 702 S.E.2d 415 (2010).

Decision by trial counsel not to move for a continuance after an alibi witness did not appear and could not be located to testify on the defendant's behalf did not show the counsel's ineffectiveness because trial counsel testified that the alibi witness indicated by telephone that the witness did not want to testify and that defense counsel would not like what the witness had to say if counsel forced the witness to testify, and the trial court was authorized to credit counsel's testimony regarding the alibi witness; because trial counsel's investigation revealed that the supposed alibi witness was reluctant, unfavorable, and possibly prepared to commit perjury, the decision not to call such a witness was a reasonable exercise of professional judgment, and the tactical decision to proceed without the alibi witness's testimony was made after consultation with the defendant, who confirmed on the record that counsel agreed with the decision not to request a continuance. Reeves v. State, 288 Ga. 545, 705 S.E.2d 159 (2011).

Failure to request a continuance. — Trial court did not err when the court denied the defendant's ineffective assistance of counsel claim because counsel testified that counsel attempted to produce evidence of specific acts of violence by the victim against third persons but because of lack of time was not able to do so; counsel further testified that counsel did not strenuously pursue a continuance for more time to gather such evidence because of the age of the case and because counsel believed such motion for continuance would be unsuccessful. Rafi v. State, 289 Ga. 716, 715 S.E.2d 113 (2011).

Failure to request bifurcated trial.

Trial counsel's failure to move to have the charge of possession of a firearm dur-

ing the commission of a felony tried separately did not amount to ineffective assistance as the possession charge was an underlying felony for the felony murder counts and, therefore, bifurcation was not authorized. Leonard v. State, 292 Ga. 214, 735 S.E.2d 767 (2012).

Failure to pursue insanity defense. Because: (1) the record did not demonstrate that the defendant's sanity or competency was or should have been a significant issue at trial; and (2) the defendant failed to support an assertion a competency should have been raised, the defendant failed to prove the prejudice prong of an ineffective assistance of counsel claim due to counsel's failure to request an independent psychiatric examination. Thus, a new trial on this ground was unwarranted. Jennings v. State, 282 Ga. 679, 653 S.E.2d 17 (2007).

Failure to request competency hearing. — Habeas court correctly concluded that ineffective assistance of trial counsel could not be used to excuse the procedural default of the petitioner's claim that the petitioner was mentally incompetent during trial because the information that trial counsel then had available to them, including the information that trial counsel unreasonably failed to obtain, would not have led constitutionally effective counsel to pursue a claim of incompetence to stand trial and would not be reasonably probable to have resulted in a finding that the petitioner was incompetent had such a plea been pursued; the petitioner failed to prove that trial counsel rendered ineffective assistance regarding the petitioner's competence to stand trial because trial counsel withdrew the petitioner's plea of incompetence only after satisfying themselves that counsel was able to communicate effectively with the petitioner, and the trial court had an extensive opportunity to observe the petitioner in pre-trial and trial proceedings and to interact directly with the petitioner, and the court did not see sufficient indications of incompetence to pursue further evaluation. Perkins v. Hall, 288 Ga. 810, 708 S.E.2d 335 (2011).

Failure to obtain psychological evaluation of defendant. — With regard to a defendant's conviction for statutory rape and two counts of child molestation involving a stepchild, the defendant's ineffective assistance of counsel claim as a result of failure to have the defendant evaluated for mental illness and incompetence before trial or before sentencing was rejected because defense counsel testified at the defendant's motion for a new trial hearing that: (1) defense counsel did not know of the defendant's alleged prior history of psychiatric problems; (2) the defendant appeared to understand the communications that defense counsel had with the defendant; and (3) defense counsel did not explore the need for a psychological evaluation of the defendant because defense counsel did not see it as an issue. Haygood v. State, 289 Ga. App. 187, 656 S.E.2d 541 (2008).

Failure to adequately prepare witnesses. — Defendant was sentenced to death for murder. Defense counsel was not ineffective in failing to properly prepare mitigation witnesses for their testimony as it was reasonable for counsel not to rehearse the witnesses' testimony with them as counsel reasonably chose not to overly prepare them so that their testimony would come across as sincere. Whatley v. Terry, 284 Ga. 555, 668 S.E.2d 651 (2008), cert. denied, 556 U.S. 1248, 129 S. Ct. 2409, 173 L. Ed. 2d 1316 (2009).

Failure to contact alibi witnesses. Trial counsel's performance was not constitutionally flawed because counsel could not be ineffective for failing to interview and call a potential alibi witness of whom counsel was not informed, and the trial court was authorized to credit counsel's testimony regarding the alibi witnesses whose names counsel was given; the defendant did not show that the testimony of the alibi witnesses would have been relevant and favorable because neither alleged alibi witness testified at the hearing on the motion for new trial. McIlwain v. State, 287 Ga. 115, 694 S.E.2d 657 (2010).

Failure to present alibi witnesses. In a malice murder prosecution, as the defendant did not give defense counsel the correct phone number for an alleged alibi witness until trial was underway, and the witness was out of state and counsel was unable to convince the witness to appear

voluntarily, counsel did not provide ineffective assistance. Marshall v. State, 285 Ga. 351, 676 S.E.2d 201 (2009).

No ineffective counsel through examination of witnesses. — Defense counsel was not ineffective in asking the codefendant's father if the father told the defendant to hide a gun because defense counsel testified that the testimony was used to shift responsibility to the codefendant; counsel's examination of the father was cumulative of prior testimony elicited by the prosecutor. Chance v. State, 291 Ga. 241, 728 S.E.2d 635 (2012).

Failure to impeach witness. — Under the First Offender Act, O.C.G.A. § 42-8-60 et seq., the trial court properly prohibited a defendant from impeaching a witness with a forgery offense. The defendant cited no authority in support of the argument that this violated the defendant's rights under the confrontation clause of the Sixth Amendment, and the court had held that impeachment to show a general lack of trustworthiness based on a prior criminal conviction was not guaranteed by the confrontation clause. Butler v. State, 285 Ga. 518, 678 S.E.2d 92 (2009).

Trial court did not err in finding that ineffective assistance of counsel had not been proven when trial counsel failed to impeach a witness with evidence of charges pending against the witness because the defendant failed to establish that the outcome of the defendant's trial would have been different had the witness been impeached; there were eyewitness identifications of defendant as the shooter, evidence that defendant had been looking for the victim and believed the victim had robbed the defendant, and evidence that the defendant had been shot. Allen v. State, 286 Ga. 392, 687 S.E.2d 799 (2010).

Defendant failed to establish that the defendant received ineffective assistance of trial counsel due to counsel's failure to provide the state with written notice of the defendant's intent to use evidence of a witness's prior conviction for impeachment purposes pursuant to former O.C.G.A. § 24-9-84.1(b) (see now O.C.G.A. § 24-6-609) because even if the conviction had been admitted and the jury had disregarded the witness's testimony, there remained evidence sufficient to convict the defendant; the witness's trial testimony conflicted with the witness's prior statements, and the witness admitted on the stand being a crack dealer. Lanier v. State, 288 Ga. 109, 702 S.E.2d 141 (2010).

Trial counsel was not ineffective for failing to highlight the inconsistencies between a prior victim's trial testimony and the victim's account of a shooting as reported to police immediately after the victim was shot because although trial counsel testified that counsel recalled that the account in the police report was inconsistent with the victim's trial testimony, appellate counsel never inquired as to why trial counsel chose not to use the police report to impeach the state's pretrial proffer or the victim's trial testimony; in the absence of any evidence on the issue, it was presumed that trial counsel made a reasonable strategic decision not to pursue that mode of impeachment. Johnson v. State, 289 Ga. 22, 709 S.E.2d 217 (2011).

Failure to introduce medical evidence.

Trial court properly rejected the defendant's claim that trial counsel was ineffective for failing to introduce into evidence two medical evaluation documents, which the defendant alleged would have contradicted statements witnesses gave to the police, because it was mere speculation that the witnesses' statements were inconsistent with the medical reports; it was impossible for the defendant to show there was a reasonable probability the results of the proceedings would have been different but for counsel's alleged error. McClarin v. State, 289 Ga. 180, 710 S.E.2d 120 (2011), cert. denied, 132 S. Ct. 1004, 181 L. Ed. 2d 745 (2012).

Use of blood spatter experts. — In a murder prosecution, defense counsel was not ineffective for failing to properly interview a blood spatter expert before calling the expert as a witness. The expert's discussions with counsel provided support for the defendant's claim that the shooting was accidental, but at trial, the expert's testimony differed from the information relayed to counsel over the phone, and defense counsel was surprised by the testimony, which aided the prosecution.

Watkins v. State, 285 Ga. 355, 676 S.E.2d 196 (2009).

Failure to object to presence of interpreters in jury room. — With regard to two defendants' convictions for murder, the defendants failed to show that the defendants received ineffective assistance of counsel based on the defendants' respective trial counsel failing to object to the presence of two sign language interpreters in the jury room as the trial court had the two interpreters take an oath swearing that, during jury deliberations, the interpreters would merely interpret and not interject the interpreters' personal opinions, conclusions, or comments. The defendants failed to present a shred of evidence that the interpreters did anything other than comply fully with the oath taken and that trial counsel had any reasons to suspect the interpreters did otherwise. Smith v. State, 284 Ga. 599, 669 S.E.2d 98 (2008).

Failure to object to use of single interpreter. — There was no ineffectiveness of the defendant's trial counsel for failing to seek separate interpreters for the defendant and a codefendant during their criminal trial as there was no showing that the defendant's rights were impinged by the use of a single interpreter. Hung v. State, 284 Ga. 796, 671 S.E.2d 811 (2009).

Failure to object to impermissible questions/comments on defendant's pre-arrest silence from prosecution. — With regard to a defendant's convictions for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony, although the defendant's trial counsel was deficient for failing to object to the prosecutor's impermissible questions and comments relating to the defendant's pre-arrest silence regarding the defendant's failure to contact the police to inform the police of the alleged accidental shooting, the defendant was not prejudiced by the deficiency based on the overwhelming evidence of guilt, including eyewitness accounts and evidence that the deceased victim was unarmed, which negated the defendant's accidental shooting and self-defense theories. Thomas v. State, 284 Ga. 647, 670 S.E.2d 421 (2008).

Failure to object to evidence after trial completed. — Even if a decision with regard to similar transaction evidence had the effect that the defendant claimed it did, it could not be used to support an ineffective assistance of counsel claim based on failure to object because it was decided after the defendant's trial was completed. Failure to make a meritless objection did not amount to ineffective assistance of counsel. Walley v. State, 298 Ga. App. 483, 680 S.E.2d 550 (2009).

Failure to object to physical evidence. — Trial counsel was not ineffective in failing to object to testimony that a gun and ammunition, which were not alleged to be the murder weapon, were seized from the defendant's home and to the introduction of those items into evidence because the evidence was relevant and probative of the charge of possession of a firearm by a convicted felon, and an objection to the admissibility would have been fruitless. Ardis v. State, 290 Ga. 58, 718 S.E.2d 526 (2011).

Failure to file motion to suppress evidence.

Because there was nothing improper in a statement the trial court made to the panel during voir dire, counsel did not perform deficiently by failing to object to the statement, and counsel was not ineffective for failing to object to properly admitted similar transaction evidence. Edwards v. State, 282 Ga. 259, 646 S.E.2d 663 (2007).

With regard to defendant's conviction for trafficking in methamphetamine, defendant failed to establish that defense counsel was ineffective for failing to pursue a motion to suppress the evidence found in defendant's room as the evidence showed that a preliminary motion to suppress was filed and that trial counsel concluded that, based on the Fourth Amendment waivers of defendant and others involved, pursuit of the motion would have been fruitless. Corn v. State, 290 Ga. App. 792, 660 S.E.2d 782 (2008).

Defendant had not shown that counsel was ineffective for failing to attempt to suppress the defendant's videotaped statement: even if the defendant had sufficiently articulated a desire to have coun-

sel present, the defendant had waived the right by initiating discussion with police without any further prompting or interrogation by them; furthermore, the videotape supported the conclusion that the defendant was not prevented by any intoxication from knowingly waiving the defendant's Miranda rights and giving a voluntary statement. Stanley v. State, 283 Ga. 36, 656 S.E.2d 806 (2008).

Counsel was not ineffective for failing to file a motion to suppress a holster when the admission of the holster did not violate the Fourth Amendment. The information in an affidavit contained sufficient information for the magistrate to come to the commonsense conclusion that evidence of contraband could be found at the defendant's apartment, and an officer saw the holster in plain view in an area in which the officer had a right to be while searching for contraband. Cobb v. State, 283 Ga. 388, 658 S.E.2d 750 (2008).

Defendant was rendered ineffective assistance of counsel with regard to defendant's trial and conviction for aggravated assault and drug possession as a result of trial counsel's failure to move to suppress the test results of defendant's urine and blood, and evidence of a tube of cocaine found in the vehicle which defendant was driving, as the bodily fluids were unlawfully obtained from defendant while unconscious and without a warrant, and there was evidence affirmatively showing that persons other than defendant had equal opportunity to possess the cocaine that was found on the floor of the vehicle. Coney v. State, 290 Ga. App. 364, 659 S.E.2d 768 (2008).

With regard to defendant's conviction for robbery by sudden snatching, defendant failed to establish that defendant was rendered ineffective assistance of counsel for failing to file a motion to suppress based on the patrol officer having no articulable suspicion to stop defendant pursuant to the purported generic car description that was broadcast as defendant failed to make a strong showing that the motion to suppress would have been granted on the asserted ground. Cray v. State, 291 Ga. App. 609, 662 S.E.2d 365 (2008).

With regard to defendant's conviction for possession of marijuana with the intent to distribute, even if defendant had not waived the issue of defense counsel being ineffective for failing to file a motion to suppress, the challenge was meritless since the search warrant properly named the package the police sought to seize, which defendant picked up at a mailing store, and the warrant did not need to name defendant's vehicle, which defendant entered into with the package. Ferguson v. State, 292 Ga. App. 7, 663 S.E.2d 760 (2008).

With regard to defendant's convictions for possessing cocaine with the intent to distribute, possessing a firearm during the commission of a crime, and numerous other crimes, defendant failed to establish that defense counsel was ineffective for failing to file a motion to suppress with regard to challenging the contraband evidence obtained after the police attempted to stop defendant's vehicle for failing to maintain the traffic lane, which was a valid basis for making a traffic stop. As such, there was no basis to file a motion to suppress the contraband discovered in defendant's vehicle after the stop. Ray v. State, 292 Ga. App. 575, 665 S.E.2d 345 (2008).

With regard to defendant's conviction for distributing cocaine, defendant failed to establish that defendant was rendered ineffective assistance of counsel based on defense counsel failing to move to suppress the evidence obtained during a traffic stop as the motion to suppress would have been futile as the evidence showed that the officer had reasonable suspicion if not probable cause to stop the vehicle based on carefully constructing an orchestrated buy and using a confidential informant. Beck v. State, 292 Ga. App. 472, 665 S.E.2d 701 (2008), cert. denied, No. S08C1863, 2008 Ga. LEXIS 922 (Ga. 2008).

Because the defendant failed to demonstrate the existence of a meritorious Fourth Amendment argument, there was no merit to the argument that trial counsel was ineffective for failing to file a motion to suppress or motion in limine to exclude the evidence obtained from a search of the defendant's apartment. Williams v. State, 284 Ga. 849, 672 S.E.2d 619 (2009).

Defendant's armed robbery conviction was upheld on appeal as the defendant failed to show that the defendant was rendered ineffective assistance of counsel as a result of trial counsel failing to move to suppress items found in the defendant's vehicle shortly after the robbery linking the defendant to the crime. The defendant failed to prove that the damaging evidence would have been suppressed if the motion had been made. Williams v. State, 295 Ga. App. 639, 673 S.E.2d 30 (2009).

Trial counsel did not render ineffective assistance by failing to file a second motion to suppress until the morning of trial, and thus failing to secure a transcript of the hearing on the motion because trial counsel thoroughly cross-examined the arresting detective, who admitted that the detective had previously testified to three different versions of the defendant's alleged statement; therefore, even assuming that trial counsel was deficient by failing to secure a transcript before trial to impeach the detective, the deficiency did not prejudice the defendant since the arresting detective admitted to the detective's contradictory statements and, thus, the inconsistencies were known to the jury even though the prior inconsistent testimony was not read verbatim into the record. Cannon v. State, 288 Ga. 225, 702 S.E.2d 845 (2010).

Trial counsel was not ineffective for failing to move to suppress evidence found during a search of the defendant's father's home because, even if the appellate court disregarded the allegedly incorrect statements about the defendant being positively identified as a perpetrator, the affidavit in support of the search warrant accurately stated that an eyewitness had positively identified the codefendant as a murder suspect and that the codefendant was apprehended in the residence the state desired to search. Therefore, the search was conducted pursuant to a valid warrant and the evidence was admissible. Charleston v. State, 292 Ga. 678, 743 S.E.2d 1 (2013).

Failure to limit cross examination of defendant. — Defendant could not show that trial counsel performed deficiently by failing to object to the prosecutor's alleged "testimony" because the record did not support the defendant's assertion that the prosecutor, in posing leading questions to the defendant during cross-examination, "testified" against the defendant. Boatright v. State, 289 Ga. 597, 713 S.E.2d 829 (2011).

Failure to object to search warrant affidavit from which DNA obtained. — With regard to defendant's convictions for rape and other crimes, the trial court did not err by concluding that defendant's trial counsel was not ineffective for failing to object to a search warrant affidavit that led to the police obtaining a DNA swab from defendant, despite defendant's voluntary statement to the detectives being elicited in violation of Miranda and case law, as the search warrant could be predicated on defendant's voluntary but unlawfully obtained statements. Brown v. State, 292 Ga. App. 269, 663 S.E.2d 749 (2008).

Failure to object.

With regard to a defendant's conviction for statutory rape and two counts of child molestation involving a stepchild, the defendant's ineffective assistance of counsel claim as a result of failure to object to the state's DNA evidence was rejected because the defendant failed to show prejudice in that the outcome of the trial would have been no different had the DNA evidence not been admitted. The defendant's conclusory assertion that the conviction was largely based upon the DNA evidence was contradicted by the totality of the evidence in the record in that: (1) the jury heard direct evidence from the victim that the defendant forced the victim to engage in sex with the defendant over a period of years; (2) the victim testified that the defendant fathered the victim's twins; and (3) the victim's mother testified as to the victim's prior consistent outcry statements, which the mother initially did not believe. Haygood v. State, 289 Ga. App. 187, 656 S.E.2d 541 (2008).

A defendant's conviction for child molestation and related charges was upheld on appeal, and the trial court properly denied the defendant's motion for remand, as the defendant failed to show ineffective assistance of counsel as a result of defense counsel failing to object to the bolstering testimony of a child psychologist. The de-

fendant failed to show how defense counsel's strategy, which resulted in leading the expert to qualify the prior bolstering testimony on cross-examination, was unreasonable, as well as failed to show a likelihood that an objection would have led to a different trial outcome necessitating remand. Al-Attawy v. State, 289 Ga. App. 570, 657 S.E.2d 552 (2008), cert. denied, No. S08C1039, 2008 Ga. LEXIS 503 (Ga. 2008).

Although defendant's trial counsel's performance fell below objective standard of reasonableness under the first prong of the Strickland ineffective assistance of counsel test, error however was harmless because although defendant's trial counsel performed deficiently in failing to raise a hearsay objection to admission of victim's statements contained in the videotaped interview, defendant did not show that trial counsel's error prejudiced the defense since statements made by the victim during the videotaped interview were merely cumulative of testimony victim had offered at trial and for which victim was cross-examined by trial counsel. Forde v. State, 289 Ga. App. 805, 658 S.E.2d 410 (2008).

With regard to convictions for aggravated assault and related crimes, defendant failed to show that trial counsel was ineffective for failing to object or move for a mistrial when a security officer commented on defendant's pre-arrest silence, namely that defendant did not speak up as to owning the type of vehicle used to perpetrate the crimes; even if testimony on defendant's pre-arrest silence had been objectionable, defendant failed to show any prejudice since other evidence showed that defendant drove to police station in defendant's truck and consented to search of that vehicle. Gibson v. State, 291 Ga. App. 183, 661 S.E.2d 850 (2008).

Defendant failed to establish ineffective assistance of counsel; counsel's failure to object to hearsay testimony about a statement by a non-testifying witness was not ineffective assistance because the statement's admission was harmless error, the failure to object to hearsay testimony as to venue was not ineffective assistance because admissible evidence established venue, and the failure to make a chain of custody objection was not ineffective assistance because the objection would have been fruitless. White v. State, 283 Ga. 566, 662 S.E.2d 131 (2008).

With regard to defendant's convictions for child molestation and aggravated sexual battery, the trial court properly rejected defendant's contention that defendant was rendered ineffective assistance of counsel for defense counsel's failure to object to the admission of an indictment evidencing defendant's guilty plea to a prior conviction as such evidence was admissible, and the judgment entered thereon, as a complete record of a witness's criminal conviction for purposes of impeachment. Further, pretermitting whether defense counsel's failure to object to the additional document admitted constituted deficient performance, defendant failed to show prejudice from the alleged deficiency as defendant had already admitted to prior convictions during direct examination. Daniel v. State, 292 Ga. App. 560, 665 S.E.2d 696 (2008), cert. denied, 2008 Ga. LEXIS 891 (Ga. 2008).

With regard to defendant's conviction for distributing cocaine, the defendant failed to establish that the defendant was rendered ineffective assistance of counsel based on defense counsel failing to object to the admission of a recorded conversation between defendant and a confidential informant on Sixth Amendment/right to confrontation grounds. Even if the recorded conversation was objectionable as a violation of defendant's constitutional rights under the confrontation clause, trial counsel testified to various strategic reasons for keeping the confidential informant out of the courtroom at the hearing on defendant's motion for a new trial. As such, since that strategy was not patently unreasonable, the trial court did not err in finding that trial counsel's actions in that regard fell within the broad range of reasonable professional conduct. Beck v. State, 292 Ga. App. 472, 665 S.E.2d 701 (2008), cert. denied, No. S08C1863, 2008 Ga. LEXIS 922 (Ga. 2008).

A witness's passing references to the defendant's record did not put the defendant's character in issue, and even if it did, defense counsel's decision not to object was an informed strategic decision,

not ineffective assistance. McKenzie v. State, 284 Ga. 342, 667 S.E.2d 43 (2008).

In a defendant's prosecution for malice murder and cruelty to children, trial counsel was not ineffective for failing to object to testimony by military police regarding the investigation of a prior difficulty between the defendant and the five-year-old victim as trial counsel had raised a continuing objection to all testimony and evidence regarding prior difficulties and made a specific objection immediately prior to the officers' consecutive testimony. Wright v. State, 285 Ga. 57, 673 S.E.2d 249 (2009).

Counsel was not ineffective under the Sixth Amendment for not objecting when a witness testified that the witness did not believe that a defendant gave the victim a "chopper" to commit a robbery. Reasonable decisions as to whether to raise a specific objection were ordinarily matters of trial strategy; moreover, even if counsel had been successful in excluding the statement, other witnesses contradicted the defendant's account of the victim's disappearance, asserting that it was a bogus cover story. Anderson v. State, 285 Ga. 496, 678 S.E.2d 84 (2009).

Defendant did not show that trial counsel was ineffective. Defense counsel's failure to object to hearsay because counsel knew that the statements would be corroborated by the defendant's testimony later in the trial was trial strategy; counsel's failure to object to statements that counsel thought would be admissible as part of the res gestae was reasonable trial strategy; counsel believed that certain testimony was not hearsay and would also work to the defendant's benefit; counsel chose not to object to prior consistent testimony of the victim because counsel believed that the testimony showed that some of the victim's testimony was inconsistent and thus would undermine the victim's credibility; and contrary to the defendant's contention, certain testimony did not show that the defendant had a prior criminal history. Abernathy v. State, 299 Ga. App. 897, 685 S.E.2d 734 (2009).

Trial counsel was not ineffective for failing to object when the state asked the arresting officer if the defendant made a statement while in custody. The testimony was not given to prove the defendant's guilt or innocence, but could be characterized as a narrative recitation of the events surrounding the defendant's arrest by the authorities. Hardy v. State, 301 Ga. App. 115, 686 S.E.2d 789 (2009).

Trial counsel did not provide ineffective assistance by failing to object to the arresting detective's testimony about what a witness told the defendant just prior to a shooting because although the testimony was inadmissible hearsay since the state failed to lay a proper foundation for the admission of a prior inconsistent statement by not asking the witness about the witness's statement, the defendant failed to show a reasonable probability that the outcome of the trial would have been different if counsel had objected to the testimony; four eyewitnesses other than the witness testified that those witnesses saw the defendant shoot the victim, and the witnesses independently picked the defendant out of a photographic lineup. Cannon v. State, 288 Ga. 225, 702 S.E.2d 845 (2010).

Trial counsel did not render ineffective assistance by failing to object to alleged prosecutorial misconduct, the prosecutors questioning of the defendant upon the defendant's post-arrest silence, as any objection would have been overruled, since the defendant opened the door to that line of questioning, and counsel could not be ineffective for failing to make a meritless objection. Doyle v. State, 291 Ga. 729, 733 S.E.2d 290 (2012).

Defense counsel was not ineffective for failing to object to evidence that the defendant was angry at the victim because the victim failed to pay the defendant for drugs and started buying from another supplier as the evidence was relevant to motive and, thus, admissible. Griffin v. State, 292 Ga. 321, 737 S.E.2d 682 (2013).

Trial counsel was not ineffective for failing to object when an investigator testified that the defendant killed the victim or when a medical examiner testified that the death was a homicide as the identity of the person who caused the victim's death and the fact that the death was a homicide were not disputed; thus, the failure could not have affected the outcome of the trial. Butler v. State, 292 Ga. 400, 738 S.E.2d 74 (2013).

Failure to object to admission of cocaine field test. — With regard to defendant's appeal of a conviction for possessing cocaine, defendant's argument that defense counsel was ineffective in failing to object to the admission of a cocaine field test was meritless since significant evidence other than the field test supported the jury's verdict based on the officers finding a residue-laden scale commonly used to measure cocaine on defendant's person; following arrest, defendant displayed the same physical symptoms seen in persons who had swallowed cocaine when confronted by police; defendant had admitted to two people — an officer and a nurse — to swallowing the cocaine; and on two prior occasions leading to drug convictions, defendant attempted to discard cocaine to avoid detection by authorities. Moreover, defense counsel successfully undermined the field test, establishing through the state's own expert that the test was merely presumptive and lacked scientific certainty. Hinton v. State, 292 Ga. App. 40, 663 S.E.2d 401 (2008).

Failure to object to toxicologist report's inadmission. — In a murder prosecution in which the defendant claimed self-defense, a forensic toxicologist testified for the defense that the victim's blood tested positive for a metabolite of cocaine and that paranoia and aggressiveness were side effects of cocaine use. The defendant's claim that counsel was ineffective for withdrawing a request to admit the toxicologist's lab report into evidence failed as the results of the report were read into the record, the toxicologist's testimony was more extensive than the report, and the defendant's assertion that admission of the report would have altered the outcome of the trial was mere speculation. Timmreck v. State, 285 Ga. 39, 673 S.E.2d 198 (2009).

Failure to object to expert testimony.

The defendant's trial counsel was not ineffective in failing to object when a medical examiner testified that the victim's death was a homicide and not an accident, and despite the defendant's contrary claim, the testimony was not an expression of the witness's opinion on the ultimate issue in the case, as: (1) counsel did not consider the testimony objectionable because there was no dispute that the "manner" of the victim's death was a homicide, and such tactic was not unreasonable; (2) the ultimate issue for the jury to determine was whether the defendant acted with malice in response to the victim's provocation, or whether self-defense was an issue; (3) counsel testified that an objection would have been in order had the medical examiner invaded the province of the jury by expressing the opinion that the homicide was a murder; and (4) the defendant failed to show any prejudice by the testimony presented. Berry v. State, 282 Ga. 376, 651 S.E.2d 1 (2007).

Defense counsel was ineffective for failing to object to an expert's inadmissible hearsay testimony that a holster was designed for a .45 caliber pistol, which was based on the expert's conversation with a representative of the holster's manufacturer. The testimony was prejudicial, as it was the only evidence connecting the defendant to a .45 pistol and it buttressed the testimony of the state's key witness, whose credibility was a serious issue. Cobb v. State, 283 Ga. 388, 658 S.E.2d 750 (2008).

Defendant unsuccessfully contended that defendant's trial counsel rendered ineffective assistance by failing to object to an FBI agent's testimony that the crime scene appeared to have been staged and that, based on this scene, burglary was an unlikely motive; furthermore, even if trial counsel had objected to this testimony, there was no reasonable probability that the outcome of defendant's trial would have been different, given the overwhelming nature of the evidence against the defendant. Bridges v. State, 286 Ga. 535, 690 S.E.2d 136 (2010).

Trial counsel was not ineffective for failing to object to an investigator's opinion testimony about the proper administration of CPR measures as the investigator was impliedly accepted as such by the trial court and, thus, any objection would have been futile. Butler v. State, 292 Ga. 400, 738 S.E.2d 74 (2013).

Failure to object to testimony of crime scene investigator. — Trial counsel was not ineffective for failing to limit

the trial testimony of the prosecution's blood spatter expert because counsel consulted with a qualified expert and counsel's consultations gave counsel no basis for objecting to the conclusion reached by the prosecution's expert as the expert consulted reached the same conclusion as the prosecution's expert. Yancey v. State, 292 Ga. 812, 740 S.E.2d 628 (2013).

Trial counsel's failure to object to testimony from a crime scene investigator was not deficient because the opinion about the victim's physical positioning was within the bounds of a crime scene reconstructionist expert. Vanstavern v. State, 293 Ga. 123, 744 S.E.2d 42 (2013).

Expert testimony as to tests performed by others. — There was no merit to the defendant's argument that because a lab worker actually conducted the testing on a substance that a forensic chemist testified was cocaine, the defendant had been denied the Sixth Amendment right to confrontation. The chemist testified that the worker was acting under the chemist's direction and that the chemist reviewed the test results; therefore, the chemist's test was proper because the chemist arrived at the chemist's own independent conclusion that the substance was cocaine. Reddick v. State, 298 Ga. App. 155, 679 S.E.2d 380 (2009).

Failure to object to comment on victim's credibility. — Defendant failed to establish ineffective assistance of counsel with regard to defendant's trial and conviction for child molestation based on trial counsel's failure to object to certain testimony by the investigating officer that commented upon the victim's credibility as, even though trial counsel did not object, the trial court gave a curative instruction that specifically informed the jury to disregard the officer's testimony commenting on the victim's credibility, which was adequate to correct any harm. Williams v. State, 290 Ga. App. 841, 660 S.E.2d 740 (2008).

Failure to present evidence of victim's violent act. — When the defendant presented a prima facie case of justification, counsel was ineffective in not introducing evidence of a prior act of violence by the victim based on counsel's mistaken belief that such an act had to have occurred prior to the act being tried in order to be admissible. The error was not harmless, as the assault, which like the charged crime involved an assault with a gun upon a man leaving the residence of the victim's ex-spouse, was highly relevant to the sole defense of justification. Bennett v. State, 298 Ga. App. 464, 680 S.E.2d 538 (2009).

Conceding to reliability of a child victim's hearsay testimony. — Defendant failed to establish ineffective assistance of counsel with regard to defendant's trial and conviction for child molestation based on trial counsel's failure to object and conceding to the issue of reliability for the admission of the child victim's hearsay testimony as: (1) defendant failed to point to any evidence indicating that the victim's statements were unreliable since the statements were videotaped at a neutral location in a room alone with a professional forensic interviewer; (2) the forensic interviewer testified that the victim was very bright and articulate and did not appear to be coached; (3) the victim's videotaped statements were spontaneous, voluntary, and not coerced; (4) the victim's videotaped statements were consistent with other out-of-court statements; and (5) significantly, the victim's statements were consistent with defendant's statements to police. Williams v. State, 290 Ga. App. 841, 660 S.E.2d 740 (2008).

Introduction of prior conviction.

Defense counsel was not ineffective for failing to object when a witness read into the record a letter the witness received from the jailhouse informant because it was a reasonable trial strategy to introduce the letter so that defense counsel could refute the informant's claims on more than one occasion. Young v. State, 292 Ga. 443, 738 S.E.2d 575 (2013).

Failure to make meritless objection.

When it would have been meritless for defense counsel to object to portions of the state's closing argument and to reserve objections to the jury charge, the failure to make the objections did not support a claim of ineffective assistance of counsel. Sampson v. State, 282 Ga. 82, 646 S.E.2d 60 (2007).

Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally deficient nor prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, and comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense. Hampton v. State, 282 Ga. 490, 651 S.E.2d 698 (2007).

Defense counsel did not perform deficiently when defense counsel failed to make a meritless objection to the evidence of the defendant's conviction for giving false information that was less than 10 years old as former O.C.G.A. § 24-9-84.1(a)(3) and (b) (see now O.C.G.A. § 24-6-609) authorized the admission of convictions 10 years old or less for crimes involving dishonesty or making a false statement, and the trial court did not have to weigh the probative value of the old conviction against the prejudicial effect since the conviction at issue was less than 10 years old. Habersham v. State, 289 Ga. App. 718, 658 S.E.2d 253 (2008).

There was no ineffectiveness of the defendant's trial counsel for failing to object to questions posed to a codefendant and for failing to object to the prosecutor's closing argument as the testimony and comments by the prosecutor did not suggest to the jury that the defendant was unable to produce an alibi witness; further, the questions were proper, as were the prosecutor's remarks. Hung v. State, 284 Ga. 796, 671 S.E.2d 811 (2009).

In a prosecution for the murder of the defendant's romantic companion, defense counsel was not ineffective for failing to object to cross-examination of the defendant about "the cycle of violence" that occurred in some domestic relationships. As there was evidence that the defendant assaulted the victim in the past, the question was proper and an objection would have been meritless. Watkins v. State, 285 Ga. 355, 676 S.E.2d 196 (2009).

Trial counsel did not render ineffective assistance by failing to object, request a limiting instruction, or move for a mistrial in response to the testimony of the victim's cousin regarding an altercation between the victim and the defendant on the night before the shooting because the testimony was admissible under the necessity exception to hearsay as a prior difficulty, showing the defendant's motive, intent, and bent of mind; trial counsel was not deficient for failing to raise a meritless objection. Evans v. State, 288 Ga. 571, 707 S.E.2d 353 (2011).

Defendants' trial counsel was not ineffective for having failed to object on hearsay grounds to an investigator's testimony regarding the reasons why the victim's sibling and the sibling's spouse could not come to court to testify because the defendant suffered no harm from the admission of the testimony as the testimony had nothing to do with either the charged offenses or with the defendant as the alleged perpetrator of the alleged crimes. Adel v. State, 290 Ga. 690, 723 S.E.2d 666 (2012).

Failure to object to hearsay testimony of emergency room physician. — With regard to a defendant's convictions for aggravated sodomy, rape, and other related crimes, trial counsel's decision not to object to hearsay testimony of the emergency room physician who treated the victim did not amount to ineffective assistance of counsel as the physician's testimony was admissible under the hearsay exception set forth in former O.C.G.A. § 24-3-4 (see now O.C.G.A. § 24-8-803) since the challenged statements related to the cause of the victim's injuries and were made for the purpose of the victim's diagnosis and treatment. As a result, the trial court did not err in admitting the statements and, therefore, since the statements were admissible, there was no merit to the defendant's contention that the defendant's trial counsel's failure to object to the hearsay testimony was ineffective assistance. Greene v. State, 295 Ga. App. 803, 673 S.E.2d 292 (2009), cert. denied, No. S09C0862, 2009 Ga. LEXIS 259 (Ga. 2009).

Defendant could not establish that the trial court's admission of a witness's testi-

mony would have constituted an abuse of discretion had trial counsel voiced an objection because the evidence was admissible under the necessity exception to the hearsay rule, subject to the trial court's discretion. White v. State, 289 Ga. 511, 712 S.E.2d 834 (2011).

Motions to sever trial of defendants.

In a defendant's prosecution for malice murder and cruelty to children, trial counsel was not ineffective for failing to move to sever the defendant's trial from that of the codefendant, the parent of the five-year-old victim, as such a decision was a matter of trial strategy and trial counsel was able to cross-examine the parent as to any hearsay statements regarding the defendant's prior difficulties with the victim. Wright v. State, 285 Ga. 57, 673 S.E.2d 249 (2009).

Failure to object to admissible evidence, etc.

With respect to presenting chemical testing evidence and pursuing the state's undisclosed chemical test results, counsel's failure to present or pursue such evidence did not affect the outcome at trial, and counsel's performance was not ineffective. The chemical test was consistent with evidence that the state had already presented to the jury; accordingly, the undisclosed evidence was not outcome determinative. Morris v. State, 284 Ga. 1, 662 S.E.2d 110, cert. denied, 555 U.S. 1074, 129 S. Ct. 731, 172 L.Ed.2d 734 (2008).

In a malice murder prosecution, the trial court did not abuse the court's discretion in admitting testimony concerning the violent relationship between the defendant and the victim (the defendant's paramour) as the testimony qualified as prior difficulties or similar transaction evidence. Defense counsel was not ineffective for failing to object to such testimony as the objection would have been overruled. Smith v. State, 284 Ga. 304, 667 S.E.2d 65 (2008).

Any error by counsel in failing to object to the contents of a 9-1-1 call was cumulative of admissible evidence and therefore harmless. Eller v. State, 294 Ga. App. 77, 668 S.E.2d 755 (2008).

Trial counsel was not ineffective for failing to object to the testimony of the fire chief and the victim's boyfriend about what they overheard on speaker phone on the way to the hotel after the fire, because the testimony was admissible and thus, could not support such a claim. Crawford v. State, 318 Ga. App. 270, 732 S.E.2d 794 (2012).

Failure to object to admission of life insurance. — Trial counsel did not render ineffective assistance by failing to object to the state's evidence regarding life insurance policies covering the defendant's spouse because there was a nexus between the life insurance and the spouse's murder when independent evidence directly related the existence of the insurance policies to the defendant's motive for murder; the defendant asked the defendant's employer about insurance proceeds on the day the murder was discovered, the defendant made it clear to others that the defendant wanted and needed the insurance money, and the defendant explained to fellow inmates that, as a result of the defendant's commission of the murder, the defendant would be receiving a large sum in insurance proceeds. Bridges v. State, 286 Ga. 535, 690 S.E.2d 136 (2010).

Trial counsel did not render ineffective assistance by failing to object to testimony concerning incriminating statements the defendant made to a jail cell informant because the testimony was merely cumulative of the admissible testimony of two other fellow inmates; therefore, the defendant failed to show the requisite prejudice to support defendant's claim of ineffective assistance, and the trial court did not err in the court's determination that had trial counsel objected to the testimony, there was not a reasonable probability that the outcome of the trial would have been different. Bridges v. State, 286 Ga. 535, 690 S.E.2d 136 (2010).

Trial strategy and tactics regarding defense witnesses.

In defendant's convictions for armed robbery, kidnapping, and aggravated assault in connection with robbery of a fast food restaurant, defendant failed to show that trial counsel was ineffective by failing to call three acquaintances as defense witnesses, as two of the witnesses had

informed trial counsel that defendant had admitted to them that defendant was involved in the crimes; thus, defendant failed to show that trial counsel's strategy of not calling the witnesses (whose testimony would have been harmful) was patently unreasonable. Holsey v. State, 291 Ga. App. 216, 661 S.E.2d 621 (2008).

Trial counsel was not ineffective for failing to object to a lead investigator's references to a tip the investigator received from an unnamed source implicating the defendant in a shooting because counsel did object to at least one of the investigator's references to the tip and to two questions bearing the potential to elicit responses regarding the substance of the tip; because none of the investigator's references to the tip constituted reversible error, any failure of counsel to object in certain of those instances could not give rise to an ineffectiveness claim. Johnson v. State, 289 Ga. 22, 709 S.E.2d 217 (2011).

Failure to introduce evidence.

Defendant had not shown ineffective assistance of counsel, as counsel's failure to attempt to introduce into evidence additional photographs was not deficient performance when counsel testified that the state's photographs fairly illustrated the area in question and the defendant did not show anything to the contrary; counsel explained that a certain witness had not been called because the witness was clearly hostile toward the defendant, the defendant's claim that counsel should have introduced certain evidence rested on mere speculation, and the evidence showing the child victim walking through a store would have belied the defendant's assertion that the child had already been significantly injured before being left in the defendant's care. Banta v. State, 282 Ga. 392, 651 S.E.2d 21 (2007).

Defendant, who sought to withdraw a guilty plea, failed to show that counsel was ineffective for failing to introduce at a Jackson-Denno hearing evidence of the defendant's mental health evaluations; thus, the defendant's motion to withdraw the plea was properly denied. The evaluations were not yet available at the time of the hearing, and neither addressed the issue of the defendant's competence at the time the defendant gave the incriminating statement. Robertson v. State, 297 Ga. App. 228, 676 S.E.2d 871 (2009), cert. denied, No. S09C1300, 2009 Ga. LEXIS 406 (Ga. 2009).

Trial counsel was not ineffective for failing to obtain either an independent test of the blood on the defendant's shoes or an independent review of the lab's practices and procedures because defense counsel did not produce a DNA expert who would testify that the state's DNA evidence was defective, and the defendant's unfounded speculation as to the potential for a test result different from that introduced at trial did not constitute a showing of professionally deficient performance by counsel. Lanier v. State, 288 Ga. 109, 702 S.E.2d 141 (2010).

Defendant did not receive ineffective assistance of trial counsel, despite any deficient performance in counsel's lack of diligence in obtaining witness three's (W3) testimony at trial as the outcome of the trial would not have been different if W3's pre-trial testimony had been admitted since it: (1) would have contradicted the defendant's testimony that witness one (W1) told the victim not to stab the defendant; (2) would have corroborated witnesses one's (W1) and two's (W2) testimony that they did not see the victim stab the defendant; and (3) would not have established that W1 and W2 saw the victim with a knife during the altercation. Hill v. State, 291 Ga. 160, 728 S.E.2d 225 (2012).

Failure to call expert witness.

With regard to a defendant's convictions on six counts of first degree vehicular homicide and other crimes, the defendant failed to establish ineffective assistance of counsel with regard to defense counsel failing to call a particular witness to testify that the defendant was not driving the vehicle as defense counsel presented seven witnesses who testified that the defendant was not driving the vehicle at issue. Furthermore, defendant failed to establish ineffective assistance of counsel with regard to defense counsel failing to hire an accident reconstruction expert as it was a reasonable strategic decision not to challenge the cause and manner of the accident. Davis v. State, 293 Ga. App. 799, 668 S.E.2d 290 (2008).

Defendant's argument that counsel was ineffective for not calling a DNA expert was meritless. The defendant did not produce an expert to testify that the state's DNA evidence was defective, and unlike the case relied upon by the defendant, the DNA evidence was not the sole link between the defendant and the crimes. Williams v. State, 284 Ga. 849, 672 S.E.2d 619 (2009).

In a rape and aggravated sodomy case, the trial court properly rejected the defendant's claim that trial counsel was ineffective for not introducing evidence on the adult victim's mental capacity to consent. Because the defendant failed to proffer the testimony of an uncalled witness, the defendant could not prove that there was a reasonable probability that the trial would have ended differently; furthermore, counsel gave a reasonable explanation for not introducing expert testimony in that counsel believed that the victim might have the capacity to consent and that counsel believed that expert testimony on the issue would not sway the jury. Ravon v. State, 297 Ga. App. 643, 678 S.E.2d 107 (2009).

Failure to object to DNA evidence. — Trial counsel was not ineffective for failing to obtain an independent DNA analysis to challenge the state's findings because counsel's strategy in challenging the state's version of events was reasonable; the strategy was not rendered unreasonable just because another attorney could have approached the case under a different theory that would have required an independent DNA analysis. Wheeler v. State, 290 Ga. 817, 725 S.E.2d 580 (2012).

Defense counsel's failure to interview, etc.

Because trial counsel's strategic decision not to call a close family friend as a witness, who could have rebutted the state's evidence that the defendant was controlling, was supported by testimony that the witness would not have added anything to the defense and might have diluted the defendant's voluntary manslaughter theory, counsel was not ineffective in failing have the witness testify. Johnson v. State, 282 Ga. 96, 646 S.E.2d 216 (2007).

Failure to interview witnesses. — Defendant failed to establish that the defendant suffered prejudice due to defense counsel's failure to interview the defendant's co-indictees prior to trial because the defendant made no attempt to detail what information could have been revealed pre-trial if counsel interviewed the co-indictees and how such information would have been helpful to the defendant's defense; defense counsel thoroughly cross-examined both co-indictees and impeached one of the co-indictees with the co-indictee's various prior inconsistent statements to police investigators. Moore v. State, 288 Ga. 187, 702 S.E.2d 176 (2010).

Trial counsel was not ineffective for failing to conduct a pre-trial interview of an eyewitness when trial counsel testified that counsel twice went to the witness's house to try to speak with the witness but did not get a chance. Durham v. State, 292 Ga. 239, 734 S.E.2d 377 (2012).

Failure to call witness was tactical decision. — With regard to a defendant's conviction for malice murder, the defendant failed to establish that the defendant was rendered ineffective assistance of trial counsel as a result of trial counsel failing to call certain additional witnesses since at the hearing on the defendant's motion for a new trial, trial counsel testified that various tactical reasons existed for not calling the various additional witnesses. Ventura v. State, 284 Ga. 215, 663 S.E.2d 149 (2008).

Failure to call witness not ineffective assistance. — Defendant, who claimed that counsel was ineffective, did not show that the outcome of the trial would had been different had a certain eyewitness testified. Because the eyewitness stated that the eyewitness did not see who fired the shots in question, because other witnesses testified consistently with the eyewitness's pretrial statement that the defendant had been wrestled to the ground, and because those witnesses added that they saw the defendant fire a gun despite being wrestled to the ground, the defendant did not show that if the eyewitness had testified at trial, there was a reasonable probability that the result would have been different. Savior v. State, 284 Ga. 488, 668 S.E.2d 695 (2008).

Defendant claimed that trial counsel was ineffective in failing to secure the presence of the defendant's father to testify at trial; however, the defendant did not call the father as a witness at the motion for new trial hearing, and without a proffer, was not able to show that trial counsel performed deficiently in not calling the father as a witness at trial. In any event, the evidence of the defendant's guilt was overwhelming, so no prejudice was shown. Washington v. State, 285 Ga. 541, 678 S.E.2d 900 (2009).

Defendant did not receive ineffective assistance of counsel when defendant's trial counsel failed to call additional witnesses because the defendant did not identify in the defendant's brief, nor did the defendant call to testify at the motion for new trial hearing, any witnesses who could have allegedly added the "material evidence" that the defendant claimed was missing from the defendant's defense. Jennings v. State, 288 Ga. 120, 702 S.E.2d 151 (2010).

Defendant failed to show that the defendant received ineffective assistance of counsel because the defendant did not show that the defendant was prejudiced by counsel's performance in that counsel did not call an alibi witness to testify at the hearing on the defendant's motion for new trial or provide a legally recognized substitute for the witness's testimony; the defendant made no affirmative showing that the purported deficiency in counsel's representation was indicative of ineffectiveness as opposed to being an example of a conscious, deliberate, and reasonable trial strategy. Newsome v. State, 288 Ga. 647, 706 S.E.2d 436 (2011).

Trial counsel was not ineffective for failing to call the codefendant as a witness because the codefendant was not a consistent witness. Simmons v. State, 289 Ga. 773, 716 S.E.2d 165 (2011).

Claim of ineffective assistance of counsel failed because the defendant could not show prejudice as a result of counsel's failure to subpoena a witness to testify that another individual committed the alleged offenses when the defendant failed to call the witness at a motion for a new trial or present a legally acceptable substitute to substantiate the claim that the witness would have been forthcoming. Grell v. State, 291 Ga. 615, 732 S.E.2d 741 (2012).

Examination of witness on plea deal. — Given the lack of evidence of a deal between an accomplice witness and the state, trial counsel was not deficient in failing to cross-examine the witness about whether a deal existed; furthermore. counsel's representation did not fall outside of the broad range of reasonable professional conduct because counsel did not ask the witness whether the witness had a hope of benefitting from the witness's testimony. Even assuming arguendo that trial counsel was deficient in failing to cross-examine the witness about whether the witness held any hope of benefit, the defendant did not shown prejudice; the statement the witness initially gave to the police was consistent in material respects with the witness's trial testimony, and both statements were also corroborative of the victim's trial testimony. Varner v. State, 297 Ga. App. 799, 678 S.E.2d 515 (2009).

Failure to investigate and present mitigating evidence in death penalty case. — In a death penalty case, a habeas court properly found that trial counsel was deficient in investigating and presenting mitigating evidence regarding an inmate's childhood abuse and neglect and the inmate's history of substance abuse and depression. The inmate suffered prejudice because the evidence that should have been presented, showing that the inmate's history of abuse and neglect had led to the inmate's major depression and the inmate's early exposure to alcohol and drugs, would have greatly undermined the state's argument that the inmate had freely chosen a life of addiction. Hall v. McPherson, 284 Ga. 219, 663 S.E.2d 659 (2008).

Failure to present psychiatric testimony at sentencing.

Defendant was sentenced to death for murder. Defense counsel was not ineffective for allegedly failing to obtain mental health reports as the defendant would not have been prejudiced by any such failure because those reports contained material that would have been damaging to the defendant's mitigation case, including

statements that the defendant lacked remorse. Whatley v. Terry, 284 Ga. 555, 668 S.E.2d 651 (2008), cert. denied, 556 U.S. 1248, 129 S. Ct. 2409, 173 L. Ed. 2d 1316 (2009).

Defendant was not denied effective assistance of counsel, etc.

Trial counsel's trial tactics and strategy could not form the basis of an ineffective assistance of counsel claim. Moreover, although the defendant initially wanted to accept a plea offer, when the defendant decided to go to trial instead, an ineffective assistance of counsel claim attached to said decision lacked merit, as the defendant failed to show that counsel's advice in this regard was insufficient or erroneous. Starks v. State, 283 Ga. 164, 656 S.E.2d 518 (2008).

A defendant had not shown that counsel was ineffective for putting a witness's pretrial statement into evidence. Counsel testified that the statement was put into evidence so that the jury could see the inconsistencies between it and the witness's testimony in court, and the portion of the statement describing the defendant as the individual who stabbed the victim in the chest merely echoed the witness's trial testimony. Stanley v. State, 283 Ga. 36, 656 S.E.2d 806 (2008).

Defendant had not shown that counsel was ineffective for not seeking to strike certain eyewitness testimony: it was clear that the eyewitness's statement that the victim had died because the defendant stabbed the victim in the chest was not expert testimony, and any error was nonprejudicial in light of the overwhelming evidence that the defendant inflicted the stab wound to the victim's chest and the uncontradicted evidence that the victim died as the result of that wound. Stanley v. State, 283 Ga. 36, 656 S.E.2d 806 (2008).

Defendant's ineffective assistance of counsel claims lacked merit because the defendant failed to: (1) show prejudice resulting from counsel's alleged ineffectiveness by failing to impeach two witnesses on cross-examination with prior statements they made; and (2) make and, in all likelihood, could not have made, a strong showing that the identification testimony would have been suppressed had trial counsel so moved. Rivers v. State, 283 Ga. 1, 655 S.E.2d 594 (2008).

Defendant had not shown ineffective assistance of counsel because it was not unreasonable for counsel to allow defendant's statement to come into evidence, as it allowed counsel to place defendant's version of events before the jury without subjecting defendant to cross- examination; further, chain of custody objection would not have been meritorious, it was not improper for an officer to come to the defendant's house to investigate information received from an anonymous tip, it was highly probable that erroneous testimony did not contribute to the verdict, and defendant had not shown how further cross-examination of a certain witness would have produced a different result. Felton v. State, 283 Ga. 242, 657 S.E.2d 850 (2008).

Defendant's ineffective assistance of counsel argument failed. The fact that trial counsel did not introduce every single piece of evidence at a Jackson-Denno hearing that another lawyer might have introduced did not require a finding of inadequate representation, and the defendant had not shown that additional evidence would have altered the outcome of the trial; counsel could not be faulted for seeking funds for an expert when the expert's testimony would have been inadmissible; and the defendant's assertions that trial counsel failed to impeach a witness and to consult with the defendant about lesser included charges were belied by the record. Allen v. State, 283 Ga. 304, 658 S.E.2d 580 (2008).

Trial court properly denied the defendant's motion to withdraw a guilty plea to a charge of malice murder, because sufficient evidence was presented to support a finding that: (1) counsel did not render ineffective assistance in advising the defendant as to said plea; (2) counsel attempted, albeit unsuccessfully to pursue a voluntary manslaughter defense and plea deal with the state; (3) the defendant was generally competent at the time of the murder; (4) a statement by a proposed expert witness in support of said defense would have been inadmissible as an opinion on the ultimate issue and could not, in any event, have helped the defendant's

case; and (5) the viability of any type of voluntary manslaughter defense was highly unlikely. Trauth v. State, 283 Ga. 141, 657 S.E.2d 225 (2008).

There was no merit to a defendant's ineffective assistance of counsel claims. A motion to suppress incriminating letters would have been meritless because the defendant's friend willingly handed the letters over to police and the letters were not discovered as a result of an illegal search; counsel did not have a witness testify because counsel did not believe that the witness was credible; and given the fact that the defendant would have been subject to extensive and potentially damaging cross-examination about the letters had the defendant testified, counsel was not deficient in advising the defendant not to testify and the defendant had not been prejudiced by not testifying. Lockheart v. State, 284 Ga. 78, 663 S.E.2d 213 (2008).

Defendant did not show ineffective assistance of counsel when there was no evidence that recusal of the trial judge was warranted and there was no evidentiary support for the defendant's claim that trial counsel did not adequately involve the defendant in the pretrial and trial proceedings. Furthermore, the defendant did not show how the alleged deficiencies would have affected the outcome of the trial. Allen v. State, 284 Ga. 310, 667 S.E.2d 54 (2008).

Defendant did not demonstrate that counsel's failure to call certain witnesses at trial or to investigate and present expert testimony on eyewitness identification constituted deficient performance. Although the defendant asserted in a new trial motion that certain witnesses had material evidence relating to the case, at the new trial hearing the defendant neither identified these witnesses nor put forward any evidence as to the testimony the witnesses would have given. Crane v. State, 294 Ga. App. 321, 670 S.E.2d 123 (2008).

Defendant did not prove that trial counsel was ineffective when the defendant did not cite to any facts in the record to support the claim, when the defendant failed to present any admissible evidence regarding what an alleged alibi witness would have said if counsel had called the witness to testify at trial, and when contrary to the defendant's claim, counsel cross-examined the victim about past drug convictions. Moreover, even if counsel was ineffective, the evidence of the defendant's guilt was overwhelming, so the defendant did not show prejudice. Rouse v. State, 295 Ga. App. 61, 670 S.E.2d 869 (2008).

Defendant's ineffective assistance of counsel claim based on counsel's failure to strike a juror and to make certain objections failed. The juror stated that the juror did not think the juror would be biased against the defendant and would try to base the juror's decision solely on the evidence; incriminating statements by the defendant were admissible as an exception to the hearsay rule as admissions against interest; a physician who testified that the victim's demeanor was consistent with that of a sexual assault victim was not bolstering the victim's testimony; even if trial counsel erred in failing to object to the prosecutor's statement that trial counsel should make the defendant show the defendant's teeth, no prejudice had been shown given counsel's rebuttal in closing and the significant evidence of guilt; and the prosecutor was not offering the prosecutor's personal belief about the veracity of an eyewitness and the victim, but instead was arguing that based on the facts and reasonable inferences drawn therefrom, the jury should conclude that those witnesses were telling the truth. Brown v. State, 293 Ga. App. 564, 667 S.E.2d 410 (2008).

As a defendant failed to show that but for defense counsel's failure to review the state's file, it was reasonably probable the defendant would have accepted the state's plea offer, the defendant was not entitled to new trial based on ineffective counsel. As the defendant had continued to deny involvement in the crime in the face of overwhelming evidence of guilt, it strained credulity for the defendant to assert that the defendant would have ever pled guilty. Cleveland v. State, 285 Ga. 142, 674 S.E.2d 289 (2009).

Counsel was not ineffective under the Sixth Amendment with regard to questioning of two witnesses. Contrary to the

defendant's argument, the first witness had not seen a statement that the defendant claimed counsel should have asked the witness about; counsel's cross-examination of the second witness was extensive and thorough; and the defendant's claim that the second witness exonerated one defendant and implicated the other did not withstand scrutiny, as the witness's trial testimony implicated both defendants. Anderson v. State, 285 Ga. 496, 678 S.E.2d 84 (2009).

Because the defendant failed to offer proof at a motion for a new trial hearing that the defendant's trial counsel was ineffective, in that counsel failed to elicit sufficient testimony from an expert at a hearing about the defendant's mental abilities and condition when the defendant made a statement to the police, the defendant failed to demonstrate prejudice and the defendant's claim of ineffective assistance was properly denied. Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Defendant's claim of ineffective assistance of counsel failed because counsel could not be ineffective for failing to object to testimony that did not affect the outcome of the trial, nor was counsel deficient in eliciting an arresting officer's testimony that the officer had heard over the police radio that the defendant was armed with a gun and prepared to use the gun as the question was designed to show that the officer was being overly dramatic, which it did and was not a patently unreasonable tactic. Westbrook v. State, 291 Ga. 60, 727 S.E.2d 473 (2012).

Claim of ineffective assistance of counsel lacked merit because the defendant failed to prove that trial counsel advised defendant that the defendant's juvenile record could be used to impeach the defendant or to show prejudice from trial counsel's failure to impeach a detective's testimony regarding the defendant's failure to raise an alibi defense in the defendant's interview with police. Cartwright v. State, 291 Ga. 498, 731 S.E.2d 353 (2012).

Defendant's claim of ineffective assistance of counsel failed because, inter alia, the evidence showed that trial counsel adequately investigated the case, conferred with a well known ballistics expert, but concluded that such expert opinion would not be helpful. Faniel v. State, 291 Ga. 559, 731 S.E.2d 750 (2012).

Claim of ineffective assistance of counsel failed, as counsel presented mitigation witnesses and conducted a reasonable investigation as to mitigating circumstances to present at sentencing; counsel was not ineffective for failing to develop and present evidence of the victim's methamphetamine use at the time of the crimes to explain the victim's behavior, because the only evidence of such use was from two to three days prior to the incident and thus, would have been irrelevant and inadmissible; and counsel was not ineffective for failing to present the testimony of the victim's girlfriend regarding a recent altercation between the victim and the victim's cousin, as the girlfriend testified at the motion for a new trial that no such fight occurred, only a scuffle in which the victim was not hit. Barrett v. State, 292 Ga. 160, 733 S.E.2d 304 (2012).

As the defendant had decided to turn himself in and had already revealed to a law enforcement officer that the defendant had killed the victim, claiming self defense, and that the defendant had attempted to conceal the body, trial counsel's decision to permit the defendant to cooperate in the interrogations and searches did not amount to ineffective assistance of counsel. Woods v. State, 291 Ga. 804, 733 S.E.2d 730 (2012).

Trial counsel's failure to convince the trial court to admit statements about the involvement of others and failure to make objection to the admission of a recorded statement did not amount to ineffective assistance because the arguments and objections sought were meritless. Bradley v. State, 292 Ga. 607, 740 S.E.2d 100 (2013).

Trial counsel was not ineffective for failing to offer a "timeline" to show that the defendant's girlfriend delayed taking the victim to the hospital because the girlfriend never provided exact times in her testimony and nothing indicated that any delay in seeking medical treatment contributed to the victim's death. Jones v. State, 292 Ga. 593, 740 S.E.2d 147 (2013).

Defense counsel was not ineffective for failing to move to redact the portion of the autopsy report that said the manner of

death was homicide because it was undisputed that the victim was killed by someone and the ultimate issue for the jury was whether the defendant was the killer. Young v. State, 292 Ga. 443, 738 S.E.2d 575 (2013).

Defendant's claim of ineffective assistance of counsel failed because the defendant failed to show either professional deficiencies by counsel or prejudice in regard to the defendant's complaints about a jury instruction on "no duty to retreat," the alleged criminal history of a witness, and the detective's alleged bolstering of a witness's testimony, claims for which the supreme court found no support. Hoffler v. State, 292 Ga. 537, 739 S.E.2d 362 (2013).

Defense counsel could not have been ineffective for failing to demand the trial court extend use immunity to a defense witness who invoked the Fifth Amendment right to remain silent as there was not current Georgia authority for such action. Ward v. State, 292 Ga. 637, 740 S.E.2d 112 (2013).

Counsel was not ineffective for failing to advocate for the defendant to have makeup, a wig, and personal grooming tools to enable the defendant to look nicer at trial because it was a reasonable trial strategy for counsel to want to present the defendant in a way that made the defendant look like a psychologically defeated and traumatized young woman who had been victimized by an abusive and violent husband. Schutt v. State, 292 Ga. 625, 740 S.E.2d 163 (2013).

Defendant's claims of ineffective assistance of counsel failed, as, inter alia, counsel was not ineffective for failing to object to an agent's testimony that the agent's investigation led the agent to believe that the defendant killed the victim as the defendant did not inquire into the reason for such failure and failed to overcome the presumption that counsel's actions fell within the broad range of reasonable professional conduct. Nor was counsel ineffective for failing to object to the district attorney's opening statement, closing argument, or other alleged misconduct as the jury was instructed that the opening statement was not evidence, the prosecutor drew reasonable inferences from the evidence in closing argument, and any factual issues were for the jury. Hall v. State, 292 Ga. 701, 743 S.E.2d 6 (2013).

Trial counsel could not be ineffective for failing to object to a jury instruction that did not affect the outcome of the trial or for failing to object to testimony, a tactical decision. Gaither v. State, 321 Ga. App. 643, 742 S.E.2d 158 (2013).

Claim of ineffective assistance of counsel failed because cell phone records and a 9-1-1 call log were cumulative of other testimony and thus, the defendant was not prejudiced by counsel's failure to object to their admission; the prejudicial effect of a misstatement in counsel's opening statement was mitigated by the trial court charging the jury that opening statements were not evidence; counsel was not ineffective for failing to make a meritless object to the admission of a witness's prior consistent statement, admissible because the witness's veracity was placed at issue; and the failure to request a charge on self-defense did not amount to ineffective assistance when the evidence did not support such a charge and it would have been inconsistent with the defense theory. Williams v. State, 292 Ga. 844, 742 S.E.2d 445 (2013).

Trial counsel was not ineffective for inadvertently opening the door to the state's question about the defendant's silence in trial counsel's attempt to highlight the accomplice's behavior of giving multiple versions of an event in an effort to point fingers at everyone except the accomplice personally. Goodman v. State, 293 Ga. 80, 742 S.E.2d 719 (2013).

Defendant's claim of ineffective assistance of counsel failed because the defendant failed to show what evidence might have been revealed if counsel had cross-examined the defendant's cousin about an unrelated indictment to show any bias the cousin might have had to color the cousin's testimony in favor of the state and how it would have produced a different result. Mathis v. State, 293 Ga. 35, 743 S.E.2d 393 (2013).

Claim of ineffective assistance of counsel failed because the defendant made no showing that the defendant's text requests for the victim's mother to call the defendant as soon as possible harmed the defendant's case, and counsel's decision

not to call an expert, after a pediatrician concluded that the victim's injuries could have been caused by CPR, was a reasonable, strategic decision. Holloman v. State, 293 Ga. 151, 744 S.E.2d 59 (2013).

Claim of ineffective assistance failed because the defendant failed to prove that the outcome would have been different if counsel had moved to redact from the indictment a charge that the defendant violated the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., though a pattern of criminal activity in furtherance of a pimping enterprise, and testimony regarding events leading up to the arrest of the defendant and another allowed counsel to argue that the weapon did not belong to the defendant but to the other individual. Holmes v. State, 293 Ga. 229, 744 S.E.2d 701 (2013).

Trial counsel's decision not to cross-examine two witnesses about certain criminal charges did not amount to ineffective assistance because it could not be said that no reasonable attorney would have decided against attempting to ask about the charges given their limited probative value to show bias and the cross-examination that counsel did conduct. Romer v. State, 293 Ga. 339, 745 S.E.2d 637 (2013).

Failure to allow defendant to testify.

In a malice murder trial, trial counsel was not ineffective in advising the defendant not to testify even though only the defendant could have supplied the details surrounding the shooting, given the weakness of the state's case, the trial court's permission to argue justification without using the word, the defendant's reluctance to testify, the belief that the state's rebuttal witnesses would be very hostile, and the desire to eliminate the possibility of a voluntary manslaughter instruction. Muller v. State, 284 Ga. 70, 663 S.E.2d 206 (2008).

In a defendant's prosecution for, inter alia, felony murder, defense counsel's opening statement that the defendant would testify to explain why the defendant carried a gun was not ineffective assistance for causing a negative inference when the defendant did not testify as defense counsel used proper strategy in not having the defendant testify after concluding that the state failed to carry the state's burden during trial. Watkins v. State, 285 Ga. 107, 674 S.E.2d 275 (2009).

Failure to call character witness.

Defendant did not show ineffective assistance when trial counsel used a third party's confession to challenge the thoroughness of the police investigation, but instead focused on challenging the voluntariness of the defendant's taped statement. The defendant did not show that this strategic decision was an unreasonable one or that the defense was prejudiced by counsel's decision not to call the third party based on counsel's assessment that the party lacked credibility. Boseman v. State, 283 Ga. 355, 659 S.E.2d 364 (2008).

Calling one good clean witness instead of numerous witnesses. — Defendant failed to demonstrate that trial counsel rendered ineffective assistance by failing to call additional witnesses because the defendant failed to overcome the strong presumption that counsel's tactical decision to forego putting the subject witnesses on the stand was within the broad range of reasonable professional conduct; trial counsel testified that counsel decided not to present the other witnesses because counsel thought that the witnesses would not "stand up well to cross-examination," that the jury would perceive variances in the testimony, that counsel was worried about credibility issues, and that counsel thought the defendant's "best chance" at establishing an alibi was with "one good clean witness." Smiley v. State, 288 Ga. 635, 706 S.E.2d 425 (2011).

Failure to object to bolstering. — Defendant failed to prove that trial counsel was ineffective for failing to object to an investigator's testimony allegedly bolstering testimony of the defendant's girlfriend because there were several reasons a lawyer might not have objected, including not wanting to signal to the jury that defense counsel was worried about the testimony. Jones v. State, 292 Ga. 593, 740 S.E.2d 147 (2013).

Failure to object to clearing of courtroom for young victim's testimony. — With regard to defendant's con-

victions on two counts of cruelty to children in the first degree and one count of aggravated battery, defendant failed to establish that defense counsel was ineffective for failing to object to the clearing of the courtroom when the child victim testified as defense counsel testified at the new trial hearing that defense counsel did not object to the closing of the courtroom because defense counsel recognized that the victim was very young and defense counsel believed it to be appropriate under the circumstances. As a result, defense counsel's decision not to object clearly constituted an exercise of reasonable professional judgment. Glover v. State, 292 Ga. App. 22, 663 S.E.2d 772 (2008).

Failure to make motion for directed verdict of acquittal not ineffective.

Defense counsel's failure to move for a directed verdict did not constitute ineffective assistance because the evidence presented was sufficient to sustain defendant's conviction for armed robbery; therefore, defendant was not entitled to a directed verdict and counsel's failure to move for the same did not entitle defendant to a new trial. The failure of counsel to pursue a meritless motion did not constitute ineffective assistance of trial counsel. Range v. State, 289 Ga. App. 727, 658 S.E.2d 245 (2008).

Counsel's failure to object to the prosecutor's comments on the ground that the prosecutor improperly commented on the defendant's exercise of the defendant's right to remain silent by remarking on the defendant's failure to testify at trial did not amount to deficient performance because the challenged remarks were not improper; the prosecutor made the comments while seeking to persuade the jury that the defendant's statements and behavior shortly after the crimes were inconsistent with the defendant's theory of self-defense, and the remarks were not intended to comment on the defendant's failure to testify or would have been received as such by the jury.. Lacey v. State, 288 Ga. 341, 703 S.E.2d 617 (2010).

Failure to object to jury pool. — Claim that trial counsel rendered constitutionally ineffective assistance failed as the defendant could not show that any competent attorney would have decided not to object further to the composition of the jury pool. Leslie v. State, 292 Ga. 368, 738 S.E.2d 42 (2013).

Failure to object to jury charge.

Because an erroneous jury instruction on an offense of aggravated child molestation violated an inmate's due process rights by allowing the jury to convict in a manner not charged in the indictment, and the inmate's trial counsel was ineffective in failing to object to the instruction, the inmate was properly granted habeas relief. Hall v. Wheeling, 282 Ga. 86, 646 S.E.2d 236 (2007).

Trial counsel was not ineffective in failing to request charges on voluntary manslaughter, self-defense, and accident as such instructions were contrary to the defense strategy based on the defendant's testimony of contending that the defendant did not have a gun in the defendant's hands until the fighting and shooting were finished. Savior v. State, 284 Ga. 488, 668 S.E.2d 695 (2008).

Defense counsel was not ineffective for failing to object to an instruction that if the jury found the defendant was not guilty of armed robbery, the jury could not find the defendant guilty of possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b). As the commission of the underlying felony was an essential element of § 16-11-106(b), the instruction was a correct statement of the law. Soloman v. State, 294 Ga. App. 520, 669 S.E.2d 430 (2008).

With regard to a defendant's convictions for aggravated sodomy, rape, and other related crimes, trial counsel's decision not to object to the jury charge on kidnapping with bodily injury did not amount to ineffective assistance of counsel as the trial court employed the language of the relevant statute, O.C.G.A. § 16-5-40, and instructed the jury that the offense of kidnapping with bodily injury occurs when a person abducts "or" steals away any person. The fact that the indictment charged the defendant with abducting "and" stealing away the victim did not require trial counsel to object to the jury charge as the statute provided only one way in which kidnapping can be committed, namely by abducting or stealing away the victim,

and the jury charge using the statutory language was appropriate, even though the indictment used the conjunctive. Greene v. State, 295 Ga. App. 803, 673 S.E.2d 292 (2009), cert. denied, No. S09C0862, 2009 Ga. LEXIS 259 (Ga. 2009).

In a malice murder prosecution, defense counsel was not ineffective for not reserving objections to the trial court's jury charge generally as this procedure was not allowed under O.C.G.A. § 17-8-58. Marshall v. State, 285 Ga. 351, 676 S.E.2d 201 (2009).

Defendant was not denied effective assistance of trial counsel due to counsel's failure to object to an allegedly sequential jury instruction and to attempt to exclude an allegedly prejudicial charge on adultery because the trial court's charge was not improperly sequential, and counsel could not be considered professionally deficient for failing to object to the charge; the charge on adultery did not prevent the jurors from considering adultery as provocation for a verdict of voluntary manslaughter because the trial court specifically charged the jury that they could consider voluntary manslaughter if it was shown by the evidence that the killing was done by the defendant without malice and not in the spirit of revenge but under a violent, sudden impulse of passion created in the mind of the defendant by ongoing adultery or recent discovery of past adultery. Loadholt v. State, 286 Ga. 402, 687 S.E.2d 824 (2010).

Although the defendant claimed that the defense attorney failed to object to a portion of the charge to the jury regarding the defense of justification, the existence of a mere verbal inaccuracy in the jury instruction, resulting from a palpable slip of the tongue and which could not have misled or confused the jury, did not provide a basis for reversal of the conviction. Therefore, the defendant did not prevail on the defendant's ineffective assistance of counsel claim because the defendant could not show that a reasonable probability existed that, but for counsel's errors the outcome at trial would have been more favorable. Render v. State, 288 Ga. 420, 704 S.E.2d 767 (2011).

Because no reversible error occurred with respect to the instruction that the jury could consider the intelligence of the witnesses to decide the witnesses credibility, the codefendant could not succeed on the alternative claim that trial counsel rendered ineffective assistance in failing to object to that instruction. Howard v. State, 288 Ga. 741, 707 S.E.2d 80 (2011).

Trial counsel was not ineffective for failing to bring errors in the jury charges to the trial court's attention because the complained of jury charges were proper, and trial counsel's conduct fell well within the broad range of reasonable professional conduct; there is no reasonable likelihood of a different outcome had trial counsel raised the arguments the defendant asserted counsel should have raised. Davis v. State, 290 Ga. 757, 725 S.E.2d 280 (2012).

Failure to request limiting instruction.

Trial counsel was not ineffective for failing to request a jury instruction on accessory after the fact because regardless of whether any evidence would have authorized the jury to conclude that the defendant's connection with the crime of murder charged in the bill of indictment was that of an accessory after the fact, the trial court would not have been authorized to give any charge on accessory after the fact when the defendant was not indicted for both murder and hindering the apprehension of a criminal or any other offense in the nature of an obstruction of justice. Vergara v. State, 287 Ga. 194, 695 S.E.2d 215 (2010).

Failure to file motion to suppress evidence.

With regard to defendant's convictions for aggravated assault and related crimes, defendant failed to show that trial counsel was ineffective for failing to file motion to suppress victim's pre-trial photographic lineup and subsequent in-court identifications of defendant, as there was no basis upon which trial counsel could have successfully moved to have the identifications suppressed since the photographic lineup was not shown to have been unduly suggestive and in-court identification was unquestionably admissible; thus, there was no possibility that suppression motion would have been successful. Gibson v.

State, 291 Ga. App. 183, 661 S.E.2d 850 (2008).

Failure to request charge on mutual combat. — Trial counsel did not perform deficiently by failing to request a charge on mutual combat because there was no evidence of a mutual intention to fight; at trial, the defendant presented the defense of accident and asserted that the defendant lacked any intention to shoot the victim, but there was no evidence reflected that the defendant and the victim mutually agreed to fight each other. Boatright v. State, 289 Ga. 597, 713 S.E.2d 829 (2011).

Failure of counsel to poll the jury, etc.

A jury sent a question to the trial court, but before the court could respond, the jury reached a verdict. The defendant's trial counsel was not ineffective for not demanding that the jury be polled; moreover, the defendant failed to show it was reasonably probable that had the jury been polled, a problem with the verdict would have become apparent. Soloman v. State, 294 Ga. App. 520, 669 S.E.2d 430 (2008).

Failure to request mistrial not ineffective assistance.

Counsel for a defendant was not shown to have been ineffective in the defendant's criminal trial when counsel failed to seek a mistrial upon the admission of testimony that the defendant had committed prior sexual abuse on a family member as the jury was admonished to ignore the remark and the jury was given a curative instruction, and counsel chose not to seek a mistrial as a matter of trial strategy. Carroll v. State, 292 Ga. App. 795, 665 S.E.2d 883 (2008).

Trial counsel was not ineffective in failing to move for a mistrial or request a curative instruction when the State of Georgia showed the jury two photographs of the murder victim's body at the crime scene, which the trial court had previously ordered the state not to show on the ground that the photographs were duplicative of other photographs. Given that the two photographs did not show the jury more than other crime scene photographs, and given the strength of the evidence against the defendant, the defendant failed to show that, even if the trial counsel had moved for a mistrial or requested a curative instruction, there was a reasonable probability that the trial court would have granted a mistrial or that the outcome of the trial otherwise would have been different. Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Failure to advise defendant of prosecution as recidivist. — A trial court did not err in denying defendant's motion for new trial on the grounds of ineffective assistance of counsel with regard to the defendant's drug-related convictions, based on defense counsel failing to advise defendant that the state intended to prosecute defendant as a recidivist since defendant did not testify that defendant would have accepted a plea offer had defendant known that defendant was facing the prospect of being sentenced as a recidivist; thus, defendant failed to show that counsel's alleged deficiency affected the end result of the case. Furthermore, defendant did not show in the record that the state made or was amenable to any plea negotiations. Heard v. State, 291 Ga. App. 550, 662 S.E.2d 310 (2008).

Incorrect advice regarding eligibility for parole leading to guilty plea.

A defendant was properly allowed to withdraw a guilty plea to armed robbery, and the probation revocation that this plea triggered was properly reversed, as counsel had been ineffective in wrongly advising the defendant that the defendant would be eligible for parole if a guilty plea was entered. Instead, under O.C.G.A. § 17-10-7(b)(2), the defendant's second conviction for a serious violent felony mandated a sentence of life imprisonment without the possibility of parole. Tillman v. Gee, 284 Ga. 416, 667 S.E.2d 600 (Oct. 6, 2008).

Failure to give correct advice on mandatory minimum sentence. — It was proper to deny a defendant's motion for new trial based on ineffective assistance. There were opposing arguments, each supported by the record, as to whether the defendant would have pled guilty had counsel correctly informed the defendant of the mandatory minimum sentence, which presented factual matters primarily for resolution by the trial court.

Childrey v. State, 294 Ga. App. 896, 670 S.E.2d 536 (2008).

Failure to put on mitigating evidence at a sentencing hearing, etc.

Trial court erred in concluding that the defendant was denied effective assistance of counsel in the sentencing phase as to the presentation of mitigation evidence as a reasonable lawyer might reasonably have concluded that the mitigating value of the testimony family members might have given was less than the potential downside of such testimony, which conflicted with expert testimony. State v. Worsley, 293 Ga. 315, 745 S.E.2d 617 (2013).

Defendant's claim that attorney inadequately investigated and presented mitigating evidence in sentencing hearing, etc.

Defendant was sentenced to death for murder. Counsel's investigation into the defendant's abuse at the hands of relatives was not deficient, because the defense investigator contacted the relatives' child, who testified at trial, and the defendant told counsel and testified at trial that the defendant had an ideal childhood while living with the relatives. Whatley v. Terry, 284 Ga. 555, 668 S.E.2d 651 (2008), cert. denied, 556 U.S. 1248, 129 S. Ct. 2409, 173 L. Ed. 2d 1316 (2009).

Waiver of jury trial.

On a claim that trial counsel was ineffective in advising a defendant to waive the right to a jury trial, the proper inquiry is whether the defendant has demonstrated a reasonable probability that the outcome of the proceeding would have been different had the defendant not waived the right to a jury trial on advice of counsel. Given the strength of the evidence against the defendant, the defendant failed to demonstrate a reasonable probability that the outcome of the trial would have been different if tried before a jury; accordingly, the defendant's claim that counsel was ineffective in advising the defendant to waive a jury trial failed. Hendrix v. State, 284 Ga. 420, 667 S.E.2d 597 (2008).

Failure to impeach witness.

With regard to defendant's convictions for first degree arson, criminal damage to property in the second degree, threatening a witness in an official proceeding by unlawfully causing economic harm to a family member, and use of intimidation with the intent of influencing a witness to change the witness's testimony in an official proceeding, defendant was not denied the right to legal representation free from conflicts of interest because defendant's attorney also represented codefendant as defendant's alibi defense was not inconsistent with codefendant's, rather, the alibis were corroborative of each other and mutually supportive since defendant and codefendant both stated that each returned to codefendant's house without incident and defendant thereafter went to defendant's parent's house. The defenses were synergistic rather than antagonistic, and the representation by the same attorney did not give rise to any conflict of interest, potential or actual. Shelnutt v. State, 289 Ga. App. 528, 657 S.E.2d 611 (2008), cert. denied, No. S08C0977, 2008 Ga. LEXIS 518 (Ga. 2008).

With regard to defendant's conviction for arson and other related crimes, defendant failed to establish that defense counsel rendered ineffective assistance by failing to impeach a witness with evidence that the witness previously had committed arson as instances of specific misconduct cannot be used to impeach a witness's character or veracity unless the misconduct resulted in the conviction of a crime involving moral turpitude, and the proper method of proving such a conviction was by the introduction of a certified copy of the conviction. Since no conviction existed, defense counsel could not be charged with deficient performance in failing to attempt to introduce inadmissible evidence. Shelnutt v. State, 289 Ga. App. 528, 657 S.E.2d 611 (2008), cert. denied, No. S08C0977, 2008 Ga. LEXIS 518 (Ga. 2008).

Trial counsel did not fail to adequately question and impeach the state's witness because counsel did not question the witness about potential deals, favorable treatment, or why the witness was handcuffed since the witness was arrested on a material witness warrant and had no pending cases about which to make a deal; the defendant could not show prejudice because the state had already elicited

from the witness information about prior drug convictions and that the witness was jailed the preceding day for failing to appear to testify in the defendant's case. Johnson v. State, 290 Ga. 382, 721 S.E.2d 851 (2012).

Trial counsel's decision not to impeach a witness with a prior criminal history was not patently unreasonable in light of counsel's testimony that counsel impeached the witness by showing inconsistencies between the witness's testimony and a prior statement to police. Romer v. State, 293 Ga. 339, 745 S.E.2d 637 (2013).

State's barrage of questions to a non-testifying co-indictee violated defendant's right. — In a defendant's trial for trafficking in methamphetamine, trial counsel provided ineffective assistance of counsel by failing to object to a prosecutor's litany of suggestive questions to a co-indictee, who refused to answer any of the questions, and to admission of the co-indictee's guilty plea. The impression left by the questions undermined the defense theory and suggested that the defendant had threatened the co-indictee; the impression was too powerful to be overcome by a jury instruction that questions by the attorneys were not evidence. Cabrera v. State, 303 Ga. App. 646, 694 S.E.2d 720 (2010).

Failure to request instructions on lesser offense.

Defendant's trial counsel was not ineffective in failing to request jury instruction on reckless conduct as lesser-included offense of aggravated assault as there was no evidence that would support a finding that defendant's driving a vehicle directly at a deputy and not stopping at a police roadblock was criminally negligent rather than intentional; further, trial counsel testified that the decision to not request a jury charge on the lesser included offense was a matter of trial strategy to pursue an all or nothing defense for the aggravated assault charge. Taul v. State, 290 Ga. App. 288, 659 S.E.2d 646 (2008).

In a malice murder prosecution, defense counsel was not ineffective in failing to request an instruction on voluntary manslaughter as the defendant was fully advised on this issue and decided to pursue an "all or nothing" strategy and rely solely on self-defense. Brown v. State, 285 Ga. 324, 676 S.E.2d 221 (2009).

Refusal to withdraw as trial counsel after defendant filed bar complaint. — In defendant's convictions for armed robbery, kidnapping, and aggravated assault in connection with robbery of a fast food restaurant, defendant failed to show trial counsel performed deficiently by failing to withdraw as counsel despite existence of conflict of interest created by defendant having filed a bar complaint against trial counsel; evidence supported trial court's determination that defendant failed to carry the burden of proving that trial counsel's refusal to withdraw constituted ineffective assistance. Holsey v. State, 291 Ga. App. 216, 661 S.E.2d 621 (2008).

Ineffectiveness in voir dire not shown.

When the defendant alleged defense counsel was deficient during the voir dire of two jurors regarding the jurors' possible bias, as the defendant failed to show that, if the jurors had been further questioned, it would have become apparent that the jurors either had a fixed opinion about guilt or could not decide the case based on the evidence and instructions; the defendant failed to satisfy the prejudice prong of the ineffectiveness claim. Cade v. State, 289 Ga. 805, 716 S.E.2d 196 (2011).

Effectiveness of pretrial investigation.

Habeas court properly denied habeas petition based on ineffective assistance of trial counsel where although it was error to rule against appellant on ground that appellant, who had pleaded guilty to drug possession charges, had expressed satisfaction with trial counsel at a plea hearing, habeas court had also ruled against appellant on the ground that it did not find that appellant's testimony regarding attorney's performance was credible. Jackson v. State, 283 Ga. 462, 660 S.E.2d 525 (2008).

Failure to object to improper arguments by prosecution.

Trial counsel was not ineffective for failing to object and move for a mistrial during closing argument when the prosecutor said that the jury had an opportunity to define what was acceptable in the

community; read in context, the prosecutor appropriately urged the jury to speak on behalf of the community and rid the community of robbers and murderers. Furthermore, counsel was not ineffective because the defendant did not testify, as the evidence showed that counsel and the defendant discussed whether the defendant should testify, that counsel informed the defendant that the decision was the defendant's to make, and that the defendant decided not to testify. Gibson v. State, 283 Ga. 377, 659 S.E.2d 372 (2008).

Failure to object to opening or closing argument.

Prosecutor's remark was unlikely to be interpreted as a comment on the defendant's failure to testify and was not intended to comment on the defendant's decision not to testify, but was instead intended to address, albeit inartfully, the defendant's closing argument challenging the veracity and motives of those witnesses who were involved in the subject crimes. Thus, the failure of trial counsel to object to the remarks did not constitute deficient performance. Rosser v. State, 284 Ga. 335, 667 S.E.2d 62 (2008).

Even assuming that the prosecutor's request that the jury not turn the defendant loose on the streets was an improper comment on the defendant's future dangerousness, and that defense counsel's failure to object constituted deficient performance, in light of evidence that the defendant confessed to a murder to an accomplice, a cellmate, and an officer, the assumed deficient performance created little, if any, actual prejudice. Patterson v. State, 285 Ga. 597, 679 S.E.2d 716 (2009), cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010).

Trial counsel was not ineffective for failing to object and/or to move for a mistrial due to a statement the assistant district attorney made during closing argument because the defendant did not demonstrate that any statement by the prosecution was not a reasonable inference from the evidence; the defendant did not show that but for a lack of objection or moving for a mistrial, there was the reasonable probability that the outcome of the defendant's trial would have been different. Sanford v. State, 287 Ga. 351, 695 S.E.2d 579 (2010), cert. denied, 131 S. Ct. 1514, 179 L. Ed. 2d 336 (2011).

Counsel was not deficient in failing to object to the prosecutor's victim impact argument during opening statement because negative characterizations of the victim were proper since the characterizations were relevant to evidence later offered to explain the context in which the drug-related crimes occurred, and the prosecutor's allusion to the fact that the victim was no longer alive was relevant to the murder charge; a witness's testimony and photographs of the witness's injuries were directly relevant and admissible to prove the charge against the defendant of committing aggravated assault on the witness. Lacey v. State, 288 Ga. 341, 703 S.E.2d 617 (2010).

Trial court did not err in denying the defendant a new trial on the ground that the defendant's trial counsel's failure to object to the prosecutor's statement during closing argument amounted to ineffective assistance because the defendant could not demonstrate that the deficiency in trial court's performance prejudiced the defendant; the evidence of the defendant's guilt was overwhelming, and there was no reasonable probability that the outcome of the defendant's trial would have been more favorable had trial counsel objected, even successfully, to the prosecutor's statement in argument. Jones v. State, 288 Ga. 431, 704 S.E.2d 776 (2011).

Defendant failed to show that trial counsel was ineffective for failing to object to the prosecutor's improper argument because even assuming that an objection to the offending argument would have had merit, the defendant did not show a reasonable probability that the outcome of the trial would have been different had counsel made the objection. Jeffers v. State, 290 Ga. 311, 721 S.E.2d 86 (2012).

Failure to object to reference to redacted count of indictment. — Trial counsel's decision not to move for a mistrial when the trial court mentioned the redacted count of possession of a firearm by a convicted felon did not amount to ineffective assistance because the decision was based on counsel's belief that the single mention would not have any influence on the jury and the fact that the trial

court gave an adequate curative instruction. Vanstavern v. State, 293 Ga. 123, 744 S.E.2d 42 (2013).

What action by counsel constitutes effective assistance.

Counsel was not ineffective for introducing in evidence the defendant's videotaped statement to police without redacting portions after the defendant invoked the right to counsel and asked God to have mercy on the defendant's soul as it did not amount to an improper comment on the right to remain silent, but showed invocation of the right to counsel after giving a lengthy statement. Martin v. State, 290 Ga. 901, 725 S.E.2d 313 (2012).

Ineffective counsel established.

Habeas court erred in granting the petitioner's application for habeas corpus relief because it should not have reached the petitioner's claims of ineffective assistance since those claims had been waived; the petitioner never claimed that appellate counsel committed ineffective assistance by failing to timely raise claims that trial counsel was ineffective. Tompkins v. Hall, 291 Ga. 224, 728 S.E.2d 621 (2012).

Habeas court erred in granting the petitioner's application for habeas corpus relief because the petitioner could not show that but for the errors of appellate counsel, the outcome of the appeal would have been different in reasonable probability; irrespective of any contention that there was ineffective assistance, the petitioner remained a fugitive from justice, and the petitioner's appeal would have been dismissed. Tompkins v. Hall, 291 Ga. 224, 728 S.E.2d 621 (2012).

Failure to seek to redact portion of prior plea. — Trial counsel was ineffective in failing to seek to redact the portion of a defendant's first offender plea that related to carrying a concealed weapon. The plea to carrying a concealed weapon, a misdemeanor, was not an element of the current charge of the possession of a firearm by a first offender probationer under O.C.G.A. § 16-11-131(b). Cobb v. State, 283 Ga. 388, 658 S.E.2d 750 (2008).

Failure to object to shackling during sentencing. — A defendant was sentenced to death for murder. The defendant argued trial counsel was ineffective in failing to object to the defendant's visible shackling during the sentencing phase of the trial; the defendant was not entitled to relief as there was no showing that there was a reasonable probability that the shackling affected the outcome of the trial. Whatley v. Terry, 284 Ga. 555, 668 S.E.2d 651 (2008), cert. denied, 556 U.S. 1248, 129 S. Ct. 2409, 173 L. Ed. 2d 1316 (2009).

Strategic decisions did not result in ineffective assistance. — Defendant did not receive ineffective assistance of counsel when defendant's trial counsel failed to object to testimony by the victim's parent that placed the defendant's character in issue because counsel made a reasonable strategic decision not to object to the parent's passing reference to the defendant as "bad news" and the parent's testimony that the parent had seen the defendant "at the jail" where the parent worked; counsel wanted the jury to see that the parent hated the defendant and believed that the parent's testimony would show that the parent was simply biased against the defendant. Jennings v. State, 288 Ga. 120, 702 S.E.2d 151 (2010).

Ineffective counsel not established.

Defendants' ineffective assistance of counsel claims failed where although defendants claimed that counsel was ineffective for failing to rebut testimony that a driver's death could not have been prevented by a seat belt, defendants had not shown that such rebuttal evidence existed; counsel was also not ineffective for failing to seek a directed verdict of acquittal because the evidence was sufficient to support defendants' convictions, defendants were not prejudiced by counsel's failure to request a charge on proximate cause because there was no evidence that the driver's death could have been avoided by a seat belt, defendants by not questioning counsel's reasons for not requesting certain charges had not overcome the presumption that counsel acted reasonably, no curative need had arisen to give a charge on one defendant's right not to testify, and a Jackson-Denno hearing was not required because incriminating statements made by one defendant were not made during police interrogation, but to a nurse treating him at a hospital. Mitchell v. State, 282 Ga. 416, 651 S.E.2d 49 (2007).

A defendant who claimed that defense counsel failed to discuss "important issues" with the defendant, but who did not identify the issues in the defendant's brief or testify at the new trial hearing about what might have been discussed, did not show ineffective assistance of counsel. Furthermore, counsel was not ineffective for failing to make objections that would have been fruitless. Judkins v. State, 282 Ga. 580, 652 S.E.2d 537 (2007).

Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally deficient nor prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense. Hampton v. State, 282 Ga. 490, 651 S.E.2d 698 (2007).

Court of appeals rejected the defendant's ineffective assistance of counsel claim, because, even if: (1) the arrest warrant had been excluded; (2) two witnesses had been cross-examined regarding their identification of the defendant as the shooter, and (3) the non-testifying eyewitnesses' statements had not been relayed to the jury by the police officer, there was no reasonable probability that the defendant would have been acquitted of both crimes. Bradley v. State, 283 Ga. 45, 656 S.E.2d 842 (2008).

Because the trial court was entitled to believe counsel's testimony at the hearing on the motion for new trial that counsel advised the defendant of the right to testify at trial and that counsel met numerous times with the defendant, with ample opportunity to discuss all aspects of the case with counsel, the defendant's ineffective assistance of counsel claim in support of a motion for a new trial had to be rejected. Warren v. State, 283 Ga. 42, 656 S.E.2d 803 (2008).

Despite the defendant's twenty-one ineffective assistance of counsel claims, the Supreme Court of Georgia analyzed only five of these claims, and found that the defendant failed to show prejudice due to counsel's failure to ask for a continuance, and that the remaining four claims addressed lacked merit. Moreover, the court declined to analyze the deficient performance prong of the defendant's remaining claims of ineffectiveness, as the defendant could not show how any of those deficiencies were prejudicial. Ruffin v. State, 283 Ga. 87, 656 S.E.2d 140 (2008).

Because the defendant failed to show that any prejudice resulted from trial counsel's alleged ineffectiveness in failing to discover and introduce the criminal record of one of the witnesses for the prosecution for impeachment purposes, the defendant's convictions were upheld on appeal. Rivers v. State, 283 Ga. 108, 657 S.E.2d 210 (2008).

Defendant had not shown ineffective assistance of counsel where, on a motion for a change of venue, defendant had not shown how live evidence or a citizen survey could have accomplished any more than the introduction in evidence of existing pretrial publicity or voir dire, and counsel's failure to prepare defendant for testimony before date of trial was not deficient performance because defendant did not indicate until the morning of trial that defendant wished to testify, defendant had not proffered evidence as to what a more thorough investigation would have uncovered, and Ga. Unif. Super. Ct. R. 31.3 did not entitle a defendant to evidentiary hearing with live witnesses to determine the admissibility of similar transaction evidence. Harvey v. State, 284 Ga. 8, 660 S.E.2d 528 (2008).

Defendant did not show that counsel was ineffective as the trial court found that if a witness that counsel failed to locate had testified, the testimony would not have been helpful in light of the witness's demeanor and credibility problems; counsel made a good faith effort to find another witness but had limited information about the witness; counsel's failure to timely notify the state of a witness's testimony was not prejudicial because the testimony would not have been helpful to the defendant and would not have been admissible at trial; and counsel was not ineffective for requesting charges on both

accident and self-defense because both were warranted. Hudson v. State, 284 Ga. 595, 669 S.E.2d 94 (2008).

Trial counsel was not ineffective for failing to conduct a more extensive cross-examination of a codefendant as counsel testified that counsel did not consider the codefendant to be a believable witness, the weight of the evidence was clearly against the codefendant, and counsel's strategy was to try to keep the defendant in the background and avoid responsibility for the crimes. Freeman v. State, 284 Ga. 830, 672 S.E.2d 644 (2009).

Defendant failed to establish ineffective assistance of counsel based on counsel's failure to object, request further curative instructions, or move for mistrial after the jury discovered unrelated shell casings and bullets in an evidence bag containing the victim's clothes because, although the defendant argued that the two gunpowder particles found on the shirt could have been deposited by the unrelated cartridges in the evidence bag, a firearms expert refuted this claim, and the defendant offered no evidence to the contrary. Thus, the defendant's theory that the extraneous cartridges may have contaminated the shirt was pure speculation and was insufficient to establish the prejudice prong of Strickland. Glover v. State, 285 Ga. 461, 678 S.E.2d 476 (2009).

Habeas court erred in granting a petitioner a new sentencing trial based on trial counsel's ineffectiveness because the absence of the deficiencies in trial counsel's performance would not in reasonable probability have resulted in a different outcome in either the guilt or innocence phase of the petitioner's trial when although trial counsel performed well below basic professional standards by choosing not to discuss issues other than guilt and innocence with the petitioner and the petitioner's family, there was no reasonable probability that a reasonable investigation of the petitioner's background would have led to counsel's having access to the type of specialized neuropsychological testimony that the petitioner presented in the habeas court; evidence of the petitioner's moderate slowness would not have had a significant effect on the jury's sentencing phase deliberations, particularly in light of the evidence showing that the petitioner functioned normally in society apart from the petitioner's criminal behavior, and new evidence of the petitioner's subtle neurological impairments, even when considered together with the other mitigating evidence that was or should have been presented at trial, would not in reasonable probability have changed the outcome of the sentencing phase if that evidence had been presented at trial. Hall v. Lance, 286 Ga. 365, 687 S.E.2d 809 (2010).

Defendant failed to meet defendant's burden of showing deficient performance and prejudice from trial counsel's actions because trial counsel's decisions to not give an opening statement and to not cross-examine the state's witnesses were reasonable trial strategies and did not amount to ineffective assistance; at the hearing on the defendant's motion for new trial, counsel testified that counsel made a strategic decision not to give an opening statement in order to "leave the door open" for counsel to pursue whatever strategy would turn out to be the most advantageous for the defendant after hearing the evidence that the state would present, and the defendant failed to show what favorable evidence could have been elicited from the witnesses who were not cross-examined by defendant's trial attorney. Lawrence v. State, 286 Ga. 533, 690 S.E.2d 801 (2010).

Trial counsel did not perform deficiently by failing to object to the trial court's instruction on possession of a firearm by a convicted felon when the defendant was charged with use of a firearm by a convicted felon because there was no need for counsel to object to the charge since the district attorney immediately advised the trial court of the error, and the jury was recalled and given instructions with regard to the crime as charged. Higginbotham v. State, 287 Ga. 187, 695 S.E.2d 210 (2010).

Defendant's trial counsel did not render ineffective assistance because none of the alleged failures on the part of trial counsel, who was the chief assistant public defender with more than 20 years of criminal experience and 100 jury trials, were so serious as to deprive the defendant of a

fair trial, a trial whose result was reliable; even if it could be said that trial counsel was deficient in counsel's performance, the defendant failed to show that, but for counsel's unprofessional errors, there was a reasonable probability that the outcome of the trial would have been different. Gresham v. State, 289 Ga. 103, 709 S.E.2d 780 (2011).

Trial court did not err when the court denied the portion of the codefendant's motion for new trial alleging ineffective assistance of trial counsel because the alleged deficiencies in trial counsel's performance were either without factual basis or were decisions made as matters of trial strategy; trial counsel did not speak with the deputy medical examiner who performed the autopsy before trial because the autopsy report was favorable to the codefendant's version of events, and trial counsel testified counsel did not ask for a jury instruction on voluntary manslaughter because it would have required an admission that the codefendant had committed an unlawful act. Smith v. State, 290 Ga. 428, 721 S.E.2d 892 (2012).

Because the defendant did not seek a hearing on the motion for a new trial or present evidence in support of the claim that trial counsel was ineffective for failing to redact bad character evidence from a witness's testimony, the defendant failed to show that trial counsel was deficient in the handling of the evidence or that there was a reasonable probability that the outcome of the trial would have been different if the testimony had been excluded. Newkirk v. State, 290 Ga. 581, 722 S.E.2d 760 (2012).

Claim of ineffective assistance of counsel failed because trial counsel understood the significance of gunpowder travel testimony, but chose not to concentrate on it because counsel did not think that the distance between the defendant and the victim was significant, and the evidence showed that the defendant intentionally grabbed the pistol and fired the pistol, creating a foreseeable risk of death that was inherently dangerous. Harris v. State, 291 Ga. 175, 728 S.E.2d 178 (2012).

Inmate was not entitled to habeas relief based on alleged ineffective assistance of counsel because, inter alia, no prejudice resulted from trial counsel's failure to retain an expert with greater expertise in police interrogation tactics and the possibility of a false confession, because the question of whether someone might be persuaded to give a false confession through persuasive interrogation techniques was "not beyond the ken of the average juror," and any deficient performance by trial counsel in failing to disclose a psychologist's testimony regarding whether the inmate's lack of emotion at the scene was due to a personality disorder was not significantly prejudicial. Humphrey v. Riley, 291 Ga. 534, 731 S.E.2d 740 (2012).

Failure to object to jury instructions. — Defendant did not receive ineffective assistance of counsel when his trial counsel failed to assert his right to address the jury after the trial court charged the jury on parties to a crime because the trial court properly instructed the jury on parties to a crime; a witness's testimony establishing that another person could have been involved in the crime authorized the trial court to charge the jury on parties to a crime. Jennings v. State, 288 Ga. 120, 702 S.E.2d 151 (2010).

Failure to move for severance. — Trial counsel's failure to renew a motion to sever did not constitute deficient performance because the strategic decision fell within the wide latitude of presumptively reasonable conduct engaged in by trial attorneys; counsel testified that counsel did not renew the motion to sever because counsel had impeached the codefendant on cross-examination and believed that the trial court would not grant severance at that stage of the proceedings. Glass v. State, 289 Ga. 706, 715 S.E.2d 85 (2011).

Defendant failed to show either that trial counsel performed deficiently in failing to request a bifurcated trial on the charge alleging possession of firearm by a convicted felon or that the defendant was prejudiced because trial counsel chose as part of the trial strategy not to seek bifurcation, and due to the lack of evidence, the trial court granted a directed verdict on the firearm possession count. Newkirk v. State, 290 Ga. 581, 722 S.E.2d 760 (2012).

Failure to file timely appeal.

Given that the defendant had no right

to file a direct appeal from a guilty plea that was evident from the record, a motion for an out-of-time appeal, which alleged ineffective assistance of counsel, was properly denied, and counsel could not be deemed ineffective for failing to inform the defendant of the right to appeal; thus, the defendant's only remedy was by habeas corpus. Barlow v. State, 282 Ga. 232, 647 S.E.2d 46 (2007).

Failure to object to admission of dying declaration. — Trial counsel was not ineffective for failing to challenge the admission of testimony regarding the victim's dying declaration because the statement satisfied the requirements for admission of a dying declaration under former O.C.G.A. § 24-3-6 (see now O.C.G.A. § 24-8-804); the defendant identified no valid basis for objection. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661 (2012).

Prosecutor's action was not inappropriate. — Trial counsel was not ineffective for failing to object during closing arguments when the state commented on the defendant's right to remain silent and failure to come forward because the prosecutor did not act inappropriately; the defendant initially placed the evidence before the jury that the defendant fled and did not go to police after the shooting. Kendrick v. State, 290 Ga. 873, 725 S.E.2d 296 (2012).

6. Waiver

Waiver must be knowing and intelligent.

Because the record showed that the defendant reinitiated further communication with police and made a knowing and intelligent waiver of any right to counsel previously invoked, the record did not support the defendant's claim that the investigators' accommodation of the defendant's request to speak to the defendant's wife in some way undermined the rule in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L. Ed. 2d 378 (1981) by prompting the defendant's request to reinitiate contact with the police. Rivera v. State, 282 Ga. 355, 647 S.E.2d 70 (2007).

No valid waiver.

Suspect can always make a spontaneous, voluntary statement which would be admissible at trial. Therefore, a defendant did not knowingly and intelligently waive the Sixth Amendment right to counsel by executing a Miranda waiver as the defendant signed the waiver only after police erroneously told the defendant that signing the waiver was a precondition to telling the defendant's "side of the story." State v. Darby, 284 Ga. 271, 663 S.E.2d 160 (2008).

State did not show that the defendant made a knowing and intelligent waiver of the right to counsel. There was no evidence that the defendant was adequately informed of the nature of the charges, the possible punishments the defendant faced, the dangers of proceeding pro se, and other circumstances that might affect the defendant's ability to adequately represent the defendant's own self; furthermore, the absence of a trial transcript prevented any consideration of whether the failure to obtain a knowing and voluntary waiver was harmless. Cook v. State, 297 Ga. App. 701, 678 S.E.2d 160 (2009).

Waiver deemed invalid.

Claims of ineffective assistance were not properly before the court on appeal because they were not raised as ineffective assistance claims in the defendant's motion for new trial. Bryant v. State, 282 Ga. 631, 651 S.E.2d 718 (2007).

Defendant initiated conversations.

It was not error to refuse to suppress the statements the defendant made during an interview with police because the defendant pointed to nothing in the record that showed the defendant had previously invoked the defendant's Fifth Amendment right to have counsel present during custodial interrogation; the fact that counsel was appointed for the defendant at a prior appearance before the trial court did not afford the defendant relief under the Sixth Amendment, and, furthermore, the interview was at the defendant's instigation. Dixon v. State, 294 Ga. 40, 751 S.E.2d 69 (2013).

Interrogation not suspended in absence of unequivocal request for counsel.

Although a child molestation defendant initially made a selective waiver of the defendant's right to counsel, agreeing to answer some questions but not others, the defendant later made an unequivocal as-

sertion of the defendant's right to counsel, at which point police should have ceased the interrogation. Admission of the defendant's statements thereafter required reversal of the defendant's convictions. Wheeler v. State, 289 Ga. 537, 713 S.E.2d 393 (2011).

Right to counsel after the right has been waived. — Trial court erred in telling a defendant that the defendant could not change defendant's mind once having decided to waive the Sixth Amendment right to counsel and represent oneself in defendant's murder trial, because the right to counsel did not evaporate following a valid waiver, and a defendant may make a post-waiver request for counsel if, for example, the defendant discovers the defendant is overwhelmed by the trial process. However, the defendant's failure to object to the statement or to make a post-waiver request for counsel barred the defendant from asserting the error on appeal. Wilkerson v. State, 286 Ga. 201, 686 S.E.2d 648 (2009).

8. Counsel on Appeal

What constitutes denial of counsel on appeal.

Trial court did not err in failing to appoint counsel to prosecute the defendant's motion for out-of-time appeal because the defendant did not file a motion to withdraw the guilty plea which, if timely, would have triggered the right to appointed counsel; because a motion for an out-of-time appeal cannot be construed as part of a criminal defendant's first appeal of right, a defendant is not entitled to the assistance of appointed counsel. Pierce v. State, 289 Ga. 893, 717 S.E.2d 202 (2011).

Denial of assistance of counsel on appeal. — Trial court erred in denying defendant's motion for an out-of-time appeal of the denial of the defendant's motion to withdraw the defendant's guilty plea. It was obvious that defendant had attempted to appeal the denial of the defendant's motion to withdraw and that the defendant's request for counsel to help the defendant pursue the defendant's appeal had never been ruled upon; prejudice was presumed and the harmless error analysis did not apply since there had been a total denial of the assistance of counsel. Stockton v. State, 298 Ga. App. 84, 679 S.E.2d 109 (2009).

Claim for ineffective assistance of appellate counsel failed. — Defendant failed to establish a reasonable probability of a different outcome had the defendant's absence from the juror colloquy been prevented or corrected, and the defendant's claim for ineffective assistance of appellate counsel failed. Griffin v. Terry, 291 Ga. 326, 729 S.E.2d 334 (2012), cert. denied, 133 S. Ct. 765, 184 L. Ed. 2d 506 (2012).

Failure to fully inform client of appellate rights.

Defendant's Sixth Amendment right to counsel was violated because a trial court failed to advise the defendant of the dangers associated with proceeding without counsel on appeal prior to accepting defendant's waiver of the right to counsel for a direct appeal of the defendant's convictions. Merriweather v. Chatman, 285 Ga. 765, 684 S.E.2d 237 (2009).

Strategic differences between trial and appellate counsel. — With regard to a defendant's convictions for malice murder and other crimes, the defendant failed to demonstrate that trial counsel's decision to forego an insanity or delusional compulsion defense, instead of pursuing the same as prior trial counsel had intended, was unreasonable as the evidence showed that defendant and trial counsel collectively agreed that the success of raising such a defense was highly unlikely. Further, the fact that trial counsel would have pursued a different strategy than the defendant's prior counsel did not render trial counsel's strategy unreasonable. Martinez v. State, 284 Ga. 138, 663 S.E.2d 675 (2008).

ADVISORY OPINIONS OF THE STATE BAR

Representation of codefendants by public defenders. — Lawyers employed in the circuit public defender office in the same judicial circuit may not represent codefendants when a single lawyer would have an impermissible conflict of interest

in doing so. However, it is only when it is decided that a public defender has an impermissible conflict in representing multiple defendants that the conflict is imputed to the other attorneys in that public defender's office. Thus, a per se rule of disqualification of a circuit public defender's office is not created prior to the determination that an impermissible conflict of interest exists. Adv. Op. No. 10-01 (April 15, 2013) approved by Sup. Ct. (July 11, 2013).

RESEARCH REFERENCES

ALR. — When does use of taser constitute violation of constitutional rights, 45 ALR6th 1.

[Amendment VII]

[Trial by Jury in Civil Cases]

Law reviews. — For article, "The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform," see 44 Ga. L. Rev. 433 (2010). For article, "Confusion Codified: Why Trademark Remedies Make No Sense," see 17 J. Intell. Prop. L. 245 (2010).

For note, "ERISA's Remedial Irony: Narrow Interpretation Paves the Way for Jury Trials in Suits for Breach of Fiduciary Duty Under ERISA," see 26 Ga. St. U.L. Rev. 971 (2010).

[Amendment VIII]

[Bails, Fines, Punishments]

Cross references. — Bail for juveniles, § 15-11-507.

Law reviews. — For article, "The Experiential Future of the Law," see 60 Emory L.J. 585 (2011).

For note, "Evaluating the Constitutionality of Proposals to Allow Non-Unanimous Juries to Impose the Death Penalty in Georgia," see 29 Ga. St. U.L. Rev. 1003 (2010). For note, "Grossly Disproportional to Whose Offense? Why the (Mis)Application of Constitutional Jurisprudence on Proceeds Forfeiture Matters," see 45 Ga. L. Rev. 841 (2011). For note, "Imprisoned by Liability: Why Bivens Suits Should Not be Available Against Employees of Privately Run Federal Prisons," see 45 Ga. L. Rev. 1127 (2011).

For comment, "'An Era of Human Zoning': Banning Sex Offenders from Communities Through Residence and Work Restrictions," see 57 Emory L.J. 1347 (2008). For comment, "Drawing the Line: DNA Databasing at Arrest and Sample Expungement," see 29 Ga. St. U.L. Rev. 1063 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration

Because arrestee had not suffered a federal Eighth Amendment violation, the arrestee also had not suffered a violation under Ga. Const. 1983, Art. I, Sec. I, Para. XVII. — Arrestee's 42 U.S.C. § 1983 suit against a county sheriff, alleging that the arrestee was raped by a deputy at the county jail, failed as a matter of law because § 1983 relief did not extend to inadequate hiring practices, and the arrestee failed to raise a fact question as to the constitutional failure to protect, staff, and train claims against the sheriff individually; because the arrestee had not suffered a federal Eighth Amendment violation, the arrestee also had not suffered a violation under Ga. Const. 1983, Art. I, Sec. I, Para. XVII. Boyd v. Nichols, 616 F. Supp. 2d 1331 (M.D. Ga. 2009).

Rape of arrestee. — Arrestee's 42 U.S.C. § 1983 suit against a county sheriff, alleging that she was raped by a deputy at the county jail, failed as a matter of law because § 1983 relief did not extend to inadequate hiring practices, and she failed to raise a fact question as to the constitutional failure to protect, staff, and train claims against the sheriff individually; because she had not suffered a federal Eighth Amendment violation, she also had not suffered a violation under Ga. Const. 1983, Art. I, Sec. I, Para. XVII. Boyd v. Nichols, 616 F. Supp. 2d 1331 (M.D. Ga. 2009).

Registration as sex offender not cruel and unusual punishment. — Trial court did not err in denying the defendant's motion to strike an illegal sentence because the requirement that the defendant register as a sex offender did not violate the Eighth Amendment's proscription against the imposition of cruel and unusual punishment. Wiggins v. State, 288 Ga. 169, 702 S.E.2d 865 (2010), cert. denied, 131 S. Ct. 2906, 179 L. Ed. 2d 1251, 2011 U.S. LEXIS 4005 (U.S. 2011).

Cited in O'Kelley v. State, 284 Ga. 758, 670 S.E.2d 388 (2008).

Excessive Bail

Denial of bail not an abuse of discretion nor grounds for habeas petition. — Petitioner charged with 16 counts of violating the Georgia RICO Act, O.C.G.A. § 16-14-1, securities fraud, and theft, who owned no assets in the United States and had allegedly funneled significant assets to Belize, where the petitioner traveled frequently, was not entitled to bail as of right under O.C.G.A. § 17-6-1(a), Ga. Const. 1983, Art. I, Sec. I, Para. XVII, or U.S. Const., amend. VIII. The denial of bail was not an abuse of discretion, and petitioner was not entitled to a writ of habeas corpus. Constantino v. Warren, 285 Ga. 851, 684 S.E.2d 601 (2009).

Fines and Punishments

Where sentences imposed are within the statutory limits, etc.

Trial court properly sentenced defendant to 220 years to serve, followed by 20 years of probation, on 24 counts of sexual exploitation of a child, as such a sentence was within the statutory parameters and did not shock the appellate court's conscious in light of the crimes committed and, in fact, defendant was actually spared serving the maximum amount of prison time authorized by O.C.G.A. § 16-12-100(g)(1). However, the trial court erred by ordering defendant to undergo chemical castration under O.C.G.A. § 16-6-4(d)(2) since such punishment was only for defendants convicted of child molestation. Bennett v. State, 292 Ga. App. 382, 665 S.E.2d 365 (2008).

Defendant's sentence for obstruction of a law enforcement officer, driving without insurance, and failing to register a vehicle of 12 months confinement to be served on probation following 60 days of confinement, $1,500 in fines, 100 hours of community service, and a mental health evaluation was within the statutory limits set by O.C.G.A. §§ 16-10-24(b), 40-2-20(c), and 40-6-10(b), and did not shock the conscience. Smith v. State, 311 Ga. App. 184, 715 S.E.2d 434 (2011).

Child molestation sentence not cruel and unusual punishment. — Although the defendant contended that the sentence provided in the amendment to O.C.G.A. § 16-6-4(d)(1), which as a result of O.C.G.A. § 17-10-6.1(b), that sentence was 25 years, followed by life on proba-

tion, with no possibility of probation or parole for the minimum prison time of 25 years, constituted cruel and unusual punishment in violation of the Eighth Amendment as applied to the defendant, the sentence was not grossly disproportionate to the defendant's crime since aggravated child molestation committed by the defendant was not a passive felony. Moreover, the juveniles had been tried as adults and sentenced to long periods of incarceration in Georgia, and severe punishments for crimes against children had withstood previous attacks on constitutional grounds. Adams v. State, 288 Ga. 695, 707 S.E.2d 359 (2011).

Life sentence for repeat offender of sexual registration statute held unconstitutional. — Imposition of a mandatory sentence of life imprisonment imposed against a defendant, who was a second time offender, for failing to register as a sexual offender was held unconstitutional as grossly disproportionate to the crime of failing to register. Bradshaw v. State, 284 Ga. 675, 671 S.E.2d 485 (2008).

Life sentence for young adult for malice murder. — Defendant's sentence of life in prison without parole for malice murder and a consecutive five years for possession of a weapon during the commission of a crime was not cruel and unusual punishment due to the fact that the defendant had just turned 20 when the defendant committed the crimes because: (1) there was no state or federal constitutional prohibition against sentencing a young adult to life in prison without parole for committing a homicide; and (2) there was no objective evidence that Georgians, as a matter of state constitutional law, considered the sentence to be cruel and unusual punishment when applied to an adult defendant who committed a homicide. Williams v. State, 291 Ga. 19, 727 S.E.2d 95 (2012).

Sentences not excessive.

An aggregate sentence of seven consecutive life sentences plus 265 years for multiple counts of armed robbery, kidnapping, and related crimes did not constitute cruel and unusual punishment, because the sentence for each offense was within statutory guidelines, and the trial court had the discretion to impose consecutive sentences for the separate offenses. Because the defendant failed to show that the punishment was so severe as to "shock the conscience," the presumption stood that the sentence did not constitute cruel and unusual punishment. Kollie v. State, 301 Ga. App. 534, 687 S.E.2d 869 (2009).

Civil in rem forfeitures.

Trial court did not err in issuing interlocutory injunctions and continuing receiverships over store property seized pursuant to O.C.G.A. § 16-14-7 based on alleged video gambling activity in violation of O.C.G.A. § 16-12-22 and racketeering activity under O.C.G.A. § 16-14-3(8) and (9). Remand was required, however, for consideration of whether the forfeitures were excessive fines in violation of U.S. Const., amend. VIII. Patel v. State, 289 Ga. 479, 713 S.E.2d 381 (2011).

Requiring DNA sample from incarcerated convicted felons not punishment. — Former O.C.G.A. § 24-4-60 (see now O.C.G.A. § 35-3-160) did not violate the Eighth Amendment because the statute, requiring all convicted felons incarcerated in a state correctional facility to provide a sample for DNA analysis to determine the identification characteristics specific to the person, does not impose any form of punishment. Further, the purpose of establishing a DNA databank had been identified, and the methods for obtaining data provided by the statute were not excessive measures in response to the purpose, therefore, without any showing of the use of excessive force that might arguably state a claim of cruel and unusual punishment in obtaining DNA samples through involuntary means, the statute was deemed not penal and the means used to enforce the statute have not been shown to be malicious or grossly disproportionate to the refusal to comply with the statutory mandate. Quarterman v. State, 282 Ga. 383, 651 S.E.2d 32 (2007).

Incomplete brain maturation not relevant to sentence. — Defendant failed to show that trial counsel was ineffective by failing to assert that the state's statutory and constitutional provisions requiring the service of mandatory minimum sentences before consideration for parole regardless of age constituted cruel

and unusual punishment in violation of the Eighth Amendment to the United States Constitution because any consideration for Eighth Amendment purposes of incomplete brain maturation due solely to age was inappropriate since the defendant was 20 years old at the time the defendant committed the crime and was sentenced to a term of years rather than death. Gandy v. State, 290 Ga. 166, 718 S.E.2d 287 (2011).

Capital Punishment

Imposition of death penalty upon minor.

Because the authority to seek a death sentence was a prerequisite for imposition of a sentence of life without parole, and because after proper retroactive application of the case law the state could not consistent with federal law seek the death penalty against the defendant, who was only 17 years old, the defendant could not legally be sentenced to life without parole; thus, the defendant's sentence of life imprisonment without the possibility of parole was void as a sentence not allowed by law. Moore v. State, 293 Ga. 705, 749 S.E.2d 660 (2013).

[Amendment X]

[Powers Reserved to States or People]

Law reviews. — For article, "Pensions and Chapter 9: Can Municipalities Use Bankruptcy to Solve Their Pension Woes?," see 27 Emory Bankr. Dev. J. 365 (2011). For article, "Solving Insolvent Public Pensions: The Limitations of the Current Bankruptcy Option," see 28 Emory Bankr. Dev. J. 89 (2011). For article, "Lochner, Lawrence, and Liberty," see 27 Ga. St. U.L. Rev. 609 (2011).

For note, "How Are Local Governments Responding to Student Rental Problems in University Towns in the United States, Canada, and England?," see 33 Ga. J. Int'l & Comp. L. 497 (2005). For note, "The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption," see 33 Ga. J. Int'l & Comp. L. 621 (2005).

For comment, "Public Health vs. Patient Rights: Reconciling Informed Consent with HPR Vaccination," see 58 Emory L.J. 761 (2009). For comment, "I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex Relationships," see 59 Emory L.J. 259 (2009).

[Amendment XI]

[Restriction of Judicial Power]

Law reviews. — For article, "General Intangible or Commercial Tort: Moral Rights and State-Based Intellectual Property as Collateral under U.C.C. Revised Article 9," see 22 Bank. Dev. J. 95 (2005). For article, "Rethinking Constitutional Review in America and the Commonwealth: Judicial Protection of Human Rights in the Common Law World," see 35 Ga. J. Int'l & Comp. L. 99 (2006). For 2006 eleventh circuit survey of admiralty law, see 58 Mercer L. Rev. 1113 (2007). For article, "Congressional End-Run: The Ignored Constraint on Judicial Review," see 45 Ga. L. Rev. 211 (2010).

JUDICIAL DECISIONS

Suit against probation office prohibited. — Since the probation office was part of the Department of Corrections under O.C.G.A. § 42-8-43.1, the district court properly dismissed the probationer's claims against the probation office as frivolous under 28 U.S.C. § 1915(e)(2)(B)(i). A suit against the probation office was

barred by the Eleventh Amendment. Lovelace v. Dekalb Cent. Prob., 2005 U.S. App. LEXIS 16090 (11th Cir. Aug. 3, 2005) (Unpublished).

[Amendment XIII]

Law reviews. — For article, "Rethinking Constitutional Review in America and the Commonwealth: Judicial Protection of Human Rights in the Common Law World," see 35 Ga. J. Int'l & Comp. L. 99 (2006). For article, "A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain," see 36 Ga. J. Int'l & Comp. L. 89 (2007). For article, "An Empirical Economic Analysis of the 2005 Bankruptcy Reforms," see 24 Bank. Dev. J. 327 (2008). For article, "Noah's Curse: How Religion Often Conflates Status, Believe, and Conduct to Resist Antidiscrimination Norms," see 45 Ga. L. Rev. 657 (2011).

For note, "Denying Reparation for Slave and Forced laborers in World War II and the Ensuing Humanitarian Rights Implications: A Case Study of the ICJA's Recent Decision in Jurisdictional Immunities of the State (Ger.V. IT.: Greece Intervening)", see 41 Ga. J. Int'l & Comp. L. 775 (2013).

JUDICIAL DECISIONS

Redistricting attempting to interfere with right of school board member to hold office or vote. — While voting rights and the right to run for public office are core constitutional rights, an attempted deprivation of constitutional or statutory rights is not the same as an actual deprivation. Furthermore, incurring legal fees to vindicate rights does not itself establish that those rights were violated. Thus, plaintiff, a school board member, pursing attempted violations of plaintiff's right to run and hold a designated seat in a predefined district, could not succeed as an injunction in another lawsuit and failure of preclearance interfered with the implementation of the efforts of defendants, the local voting registrars; since the attempt to deprive plaintiff of plaintiff's constitutional rights did not succeed, neither can plaintiff's lawsuit succeed. Cook v. Randolph County, 573 F.3d 1143 (11th Cir. 2009).

[Amendment XIV]

Law reviews. — For article, "General Intangible or Commercial Tort: Moral Rights and State-Based Intellectual Property as Collateral under U.C.C. Revised Article 9," see 22 Bank. Dev. J. 95 (2005). For article, "Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts' Equality Jurisprudence," see 34 Ga. J. Int'l & Comp. L. 557 (2006). For article, "Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression," see 56 Emory L.J. 815 (2007). For article, "How New Genetic Technologies Will Transform Roe v. Wade," see 56 Emory L.J. 843 (2007). For article, "Abortion, Equality, and Administrative Regulation," see 56 Emory L.J. 865 (2007). For article, "The Unitary Fourteenth Amendment," see 56 Emory L.J. 907 (2007). For article, "The Next Step After Roe: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation," see 56 Emory L.J. 1173 (2007). For article, "Lawrence v. Geduldig: Regulating Women's Sexuality," see 56 Emory L.J. 1235 (2007). For article, "A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain," see 36 Ga. J. Int'l & Comp. L. 89 (2007). For article, "Redefining the Right to Be Let Alone: Privacy Rights and the Constitutionality of Technical Surveillance Measures in Germany and the United States," see 35 Ga. J. Int'l & Comp. L. 433 (2007). For article, "Due Process Rights Before EU Agencies: The Rights of Defense," see

37 Ga. J. Int'l & Comp. L. 1 (2008). For article, "Parents Involved in Community Schools v. Seattle School District No. 1 and Equal Protection: An Examination of Context," see 13 Ga. St. B.J. 16 (2008). For article, "An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment," see 58 Emory L.J. 585 (2009). For article, "Mining for Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law," see 37 Ga. J. Int'l & Comp. L. 219 (2009). For article, "The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer," see 43 Ga. L. Rev. 451 (2009). For article, "The Original Meaning of the Privileges and Immunities Clause," see 43 Ga. L. Rev. 1117 (2009). For article, "State-Created Property and Due Process of Law: Filling the Void Left by Engquist v. Oregon Department of Agriculture," see 44 Ga. L. Rev. 161 (2009). For article, "Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract," see 60 Mercer L. Rev. 563 (2009). For annual survey on zoning and land use law, see 61 Mercer L. Rev. 427 (2009). For article, "Conditional Rules in Criminal Procedure: Alice in Wonderland Meets the Constitution," see 26 Ga. St. U.L. Rev. 417 (2010). For article, "Pensions and Chapter 9: Can Municipalities Use Bankruptcy to Solve Their Pension Woes?," see 27 Emory Bankr. Dev. J. 365 (2011). For article, "Gelding the Lily: How the Bankruptcy Code's Promotion of Marriage Leaves it Impotent," see 28 Emory Bankr. Dev. J. 31 (2011). For article, "Education: (Re)Considering Race in the Desegregation of Higher Education," see 46 Ga. L. Rev. 521 (2012). For article, "Education: Education's Elusive Future, Storied Past, and the Fundamental Inequities Between," see 46 Ga. L. Rev. 557 (2012). For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012). For article, "Having it Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools," see 63 Emory L. J. 303 (2013). For article, "Symposium on Evidence Reform: Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence," 47 Ga. L. Rev. 723 (2013). For article, "Courts: Juvenile Justice Reform," see 30 Ga. St. U. L. Rev. 63 (2013). For article, "(Mis)Conceptions of the Corporation," see 29 Ga. St. U.L. Rev. 731 (2013). For article, "Commerce, Death Panels, and Broccoli: or Why the Activity/Inactivity Distinction in the Health Care Case was Really About the Right to Bodily Integrity," see 29 Ga. St. U. L. Rev. 897 (2013). For article, "Sentencing Adjudication: Lessons from Child Pornography Policy Nullification," see 30 Ga. St. U.L. Rev. 375 (2014).

For note, "Official, National, Common or Unifying: Do Words Giving Legal Status to Language Diminish Linguistic Human Rights?," see 36 Ga. J. Int'l & Comp. L. 221 (2007). For note, "'Rabbit' Hunting in the Supreme Court: The Constitutionality of State Prohibitions of Sex Toy Sales Following Lawrence v. Texas," see 44 Ga. L. Rev. 245 (2009). For note, "Extra! Read All About It: Why Notice by Newspaper Publication Fails to Meet Mullane's Desire to Inform Standard and How Modern Technology Provides a Viable Alternative," see 45 Ga. L. Rev. 1095 (2011).

For comment, "Thou Shalt Not Reorganize: Sacraments for Sale First Amendment Prohibitions and Other Complications of Chapter 11 Reorganization for Religious Institutions," see 22 Bank. Dev. J. 293 (2005). For comment, "Due Process Problems Caused by Large Disparities in Grants of Asylum: Will New Department of Justice Recommendations Solve the Problem?," see 22 Emory Int'l L. Rev. 385 (2008). For comment, "'An Era of Human Zoning': Banning Sex Offenders from Communities Through Residence and Work Restrictions," see 57 Emory L.J. 1347 (2008). For comment, "You've Got Libel: How the Can-Spam Act Delivers Defamation Liability to Spam-Fighters and Why the First Amendment Should Delete the Problem," see 58 Emory L.J. 1013 (2009). For comment, "Pinpoint Redistricting and the Minimization of Partisan Gerrymandering," see 59 Emory L.J. 211 (2009). For comment, "I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex Relationships," see 59 Emory L.J. 259 (2009). For comment, "Equal Pro-

tection for Transgendered Employees? Analyzing the Court's Call for More than Rational Basis in the Glenn v. Brumby Decision," see 28 Ga. St. U.L. Rev. 1315 (2012). For comment, "A Father's Right to Counsel in Georgia Juvenile Court Legitimation Proceedings: Closing the Due Process Loophole," see 29 Ga. St. U.L. Rev. 865 (2013). For comment, "Drawing the Line: DNA Databasing at Arrest and Sample Expungement," see 29 Ga. St. U.L. Rev. 1063 (2013). For comment, "The Unconstitutional Torture of an American by the U.S. Military: Is there a Remedy Under Bivens?," see 29 Ga. St. U.L. Rev. 1093 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration

Hearsay evidence from abused children. — If it is rational to imprison a defendant who causes a child to witness sexual contact or physical abuse, it is surely rational to make the defendant merely deal with hearsay from such a child, whom the defendant may require to appear in court to testify and face cross-examination; the fact that the General Assembly loosened the hearsay rule for child witnesses to crimes involving only sexual contact and physical abuse, as opposed to all crimes or all violent crimes, should pose no problem under rational basis review. Bunn v. State, 291 Ga. 183, 728 S.E.2d 569 (2012).

Disparate classes of criminal defendants based on age of victim. — Court of appeals properly held that children's out-of-court statements about sexual conduct that happened to each other in their presence were admissible under the former Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), because the court did not err in declining to extend the holding of Woodard v. State, 269 Ga. 317 (1998), which was overruled, to the defendant's case; there was nothing irrational about creating disparate classes of criminal defendants based on the young age of the witnesses to their crimes. Bunn v. State, 291 Ga. 183, 728 S.E.2d 569 (2012).

Cited in O'Kelley v. State, 284 Ga. 758, 670 S.E.2d 388 (2008); Std. Bldg. Co. v. Wallen Concept Glazing, Inc., 298 Ga. App. 443, 680 S.E.2d 527 (2009); McClure v. Kemp, 285 Ga. 801, 684 S.E.2d 255 (2009); Miller v. State, 289 Ga. 854, 717 S.E.2d 179 (2011).

Due Process

1. In General

Modification of child support award. — Plaintiff ex-husband was correct that the due process clause of the Fourteenth Amendment protected a parent's fundamental right to participate in the care, custody, and management of their children, but he failed to show that O.C.G.A. § 19-9-3 violated his substantive due process rights because neither the U.S. Supreme Court nor the U.S. Court of Appeals for the Eleventh Circuit had held that a state had to impose a specific standard of proof for modification of visitation rights. Gottschalk v. Gottschalk, No. 10-11979, 2011 U.S. App. LEXIS 12222 (11th Cir. June 16, 2011).

Venue needs clear proof beyond reasonable doubt to protect due process. — Jury instructions set forth in O.C.G.A. § 17-2-2(c) violated the habeas petitioner's due process rights since Ga. Const. 1983, Art. VI, Sec. II, Para. V made venue an essential element of malice murder, and the instruction's mandate that jurors had to consider the cause of death to have occurred where the body was found improperly shifted the burden of proving otherwise onto the defendant. Owens v. McLaughlin, 733 F.3d 320 (11th Cir. 2013).

2. Necessity for Notice and Hearing

Notice by publication in conservator's petition for settlement. — Constructive notice by publication of a conservator's petition for final settlement and discharge from the conservatorship under O.C.G.A. §§ 29-5-80(a) and 29-5-81(b) did not violate the due process rights of a child of the ward who stood to benefit from the ward's will; the child did not have a legally protected interest in the discharge proceedings. Ray v. Stewart, 287 Ga. 789, 700 S.E.2d 367 (2010).

Due process met in suspension of public university professor. — A hearing provided a public university biology professor with the requisite due process — i.e., notice and an opportunity to be heard, because the professor was represented by counsel and was given the opportunity to present documentary evidence and witnesses, testify in his own behalf, and cross-examine the university's witnesses. The hearing satisfied the professor's right to procedural due process both with respect to his post-tenure reviews and the decision to suspend him from employment. Edmonds v. Bd. of Regents, 302 Ga. App. 1, 689 S.E.2d 352 (2009), cert. denied, No. S10C0824, 2010 Ga. LEXIS 437 (Ga. 2010).

Notice of driver's license revocation.

Administrative decision disqualifying a driver from driving a commercial motor vehicle for life based on the refusal to submit to state-administered chemical testing and a prior conviction for driving under the influence was upheld, as the arresting officer informed the driver that the driver could lose that driver's license to drive upon refusing to submit to chemical testing, and the requirements of due process did not require the arresting officer to inform the driver of all the consequences of refusing to submit to chemical testing. Moreover, the driver requested and received a hearing under O.C.G.A. § 40-5-67.1(g)(1). Chancellor v. Dozier, 283 Ga. 259, 658 S.E.2d 592 (2008).

Landowners not entitled to hearing to contest their neighbors' license to build a private dock. — General Assembly had determined that challenges to proposed construction of private docks were not within the Coastal Marshland Protection Act's framework for formal administrative challenges; this legislative determination provided landowners, who contested their neighbors' license to build a private dock, all the process the landowners were due. Hitch v. Vasarhelyi, 302 Ga. App. 381, 691 S.E.2d 286 (2010).

3. Statutory Notice of Proscribed Conduct

Statute must convey sufficiently definite warning, etc.

Appellant juvenile was not entitled to dismissal of two counts of street gang activity based on the juvenile's assertion that O.C.G.A. § 16-15-3(1)(I) was unconstitutionally vague; the language in the statute provided notice to ordinary citizens that crimes committed in violation of the laws of the United States or foreign

jurisdictions were considered criminal gang activity if the crimes fell within one of the categories of criminal gang activity enumerated in § 16-15-3(1)(A)-(H), (J). In re K.R.S., 284 Ga. 853, 672 S.E.2d 622 (2009).

O.C.G.A. § 16-13-41(h) was not unconstitutionally vague as applied to a defendant, a physician, who was charged with violating O.C.G.A. § 16-13-42(a)(1) by improperly providing 33 signed prescription forms in blank to the defendant's nurse practitioner in violation of § 16-13-41(h) as that provision broadly included possession of a document by any person other than the one whose signature appeared thereon; thus, a physician's staff member could not be excluded. Raber v. State, 285 Ga. 251, 674 S.E.2d 884 (2009).

Sufficient definiteness of criminal statute.

The conspiracy statute, O.C.G.A. § 16-4-8, is not unconstitutionally vague because its term "overt act" unambiguously refers to a specific type of open or manifest act made in furtherance of a conspiracy to commit a crime. Bradford v. State, 285 Ga. 1, 673 S.E.2d 201 (2009).

Appellant, a juvenile, was not entitled to the dismissal of two counts of street gang activity based on the juvenile's assertion that O.C.G.A. § 16-15-4(a) failed to inform ordinary citizens of what associations with a criminal street gang were prohibited under the statute; the statute required that a defendant's association with a group be active and include the commission of an enumerated offense under O.C.G.A. § 16-15-13(1), and that provided a sufficiently definite warning to persons of ordinary intelligence of the prohibited conduct. In re K.R.S., 284 Ga. 853, 672 S.E.2d 622 (2009).

Address registration requirement of O.C.G.A. § 42-1-12 is unconstitutional under the due process clause of the United States and Georgia constitutions on vagueness grounds as applied to homeless sex offenders who possess no street or route address for their residence. Santos v. State, 284 Ga. 514, 668 S.E.2d 676 (2008).

Ordinances adopted pursuant to purported charter amendment void for vagueness also unenforceable.

Trial court did not err in granting a city summary judgment in a lessee's declaratory judgment action seeking an order declaring that City of Forest Park, Ga., Ordinance § 9-8-45 was unconstitutional because the ordinance was sufficiently definite so that a person of ordinary intelligence need not guess at its meaning; although the lessee contended that the phrase "without limitation of the generality of the foregoing" opened the definition of "public sidewalk" to include any space that the city later wished to assert fell under the ordinance, the specification of parking spaces and other areas intended for public travel did not permit the interpretation the lessee contended. Braley v. City of Forest Park, 286 Ga. 760, 692 S.E.2d 595 (2010).

4. Business

Search of commercial premises. — Night club and owner's U.S. Const., amends. IV, XIV and Ga. Const. 1983, Art. I, Sec. I, Para. XIII claims against two police officers survived summary judgment where the club and the owners alleged that the officers entered the club without a warrant, probable cause, or exigent circumstances, ordered the lights turned on and the music stopped, frisked the club's patrons and handcuffed some of them without making any arrests, and acted in an intimidating manner. Illusions of the South, Inc. v. City of Valdosta, No. 7:07-cv-6 (HL), 2009 U.S. Dist. LEXIS 27154 (M.D. Ga. Mar. 30, 2009).

7. Zoning

Ordinance banning permit applications if two or more violations existed. — In a declaratory judgment action brought by a developer against a county seeking to invalidate an ordinance which required denial of the developer's land disturbance permit based on two soil-related ordinance violations existing, the judgment in favor of the developer was upheld on appeal with regard to the developer's claim for damages under 42 U.S.C. § 1983, for alleged violations of the developer's equal protection rights in the county's enforcement of the ordinance. The trial court properly determined that the

developer was not required to prove a valid property right with regard to the developer's equal protection challenge; the trial court properly awarded attorney fees to the developer under O.C.G.A. § 13-6-11 as the jury was authorized to award the attorney fees as an element of the damages it awarded on the developer's federal equal protection claim, regardless of whether the developer could prevail on any state law claim for damages; but the trial court erred by failing to address the merits of the developer's petition for a declaratory judgment since the overall enforceability of the ordinance, which was still the law, was not rendered moot by the withdrawal notice. Fulton County v. Legacy Inv. Group, LLC, 296 Ga. App. 822, 676 S.E.2d 388 (2009).

8. Pretrial Criminal Proceedings

Delay in arrest insufficient to warrant dismissal.

Defendant alleged a four-year delay between a murder and the defendant's indictment for the delay was due to the state's intent to await the defendant's convictions for other robberies and use them as "other crimes" evidence in the murder case. As the defendant relied exclusively on a hearsay document to substantiate this charge, and could not claim prejudice from an inability to call witnesses whose testimony would be inadmissible, the defendant failed to show that the defendant's due process rights under the Fourteenth Amendment were violated. Jones v. State, 284 Ga. 320, 667 S.E.2d 49 (2008).

Discovery of computer hard drive evidence in child pornography case. — Defendant who was charged with child pornography did not suffer a due process violation due to the U.S. Attorney's office not responding to letters seeking assurance that defendant's expert would not be prosecuted under federal pornography laws for examining defendant's computer hard drive; the trial court ordered that the expert be provided with a copy of defendant's computer hard drive, and the trial court's order requiring written assurances from United States Attorneys of nonprosecution of the expert for any potential violations of federal child pornography statutes exceeded the trial court's authority. The trial court's finding that O.C.G.A. § 17-16-4(a)(3)(B) was unconstitutional as applied to the defendant because it deprived the defendant of due process rights was not challenged by the state on appeal. Morris v. State, 324 Ga. App. 756, 751 S.E.2d 551 (2013).

Photo array not impermissibly suggestive.

Photographic lineup was not impermissibly suggestive because the defendant was the only one pictured with an open mouth, revealing gold teeth, and the victim had identified the perpetrator as having bottom gold teeth. It was not readily apparent that the defendant's top teeth, the only ones visible, were gold, and apart from the defendant's mouth being open slightly, the lineup depicted people with similar skin color, hair, and overall appearance. Varner v. State, 297 Ga. App. 799, 678 S.E.2d 515 (2009).

Ill defendant during voir defendant and subsequent waiver of rights. — Trial court did not abuse the court's discretion by denying a defendant's motion for a new trial based on the defendant vomiting in front of the jury during voir dire when the trial was commenced after a two day delay that was granted to the defendant after indicating an illness prevented the defendant's presence at trial. The trial court properly found that the alleged ill defendant waived the right to be present by repeatedly delaying the start of trial with the malingering conduct and by failing to object when defense counsel, in the defendant's presence, specifically requested that the trial court remove the defendant from the courtroom before bringing the jury panel back. Smith v. State, 284 Ga. 599, 669 S.E.2d 98 (2008).

Communications between parishioner and clergy admissible without assistance of counsel. — Because defendant requested the future assistance of an attorney, not immediate assistance, and because the defendant knew that the defendant's confession would be handed over to law enforcement, the clergy-parishioner privilege in former O.C.G.A. §§ 24-3-51 and 24-9-22 (see now O.C.G.A. §§ 24-8-825 and 24-5-502) were inapplicable; therefore, defendant's con-

fession to the crimes was voluntary. Willis v. State, 287 Ga. 703, 699 S.E.2d 1 (2010).

10. Criminal Trials

State did not violate a defendant's due process rights or suborn perjury by having a shooting victim testify at defendant's aggravated assault trial that defendant had shot the victim, even though the victim had previously testified in another proceeding that another person had shot the victim, because there was no showing that the victim's trial testimony was untrue or that the state knew the victim's testimony was untrue. Arnold v. State, 301 Ga. App. 714, 688 S.E.2d 656 (2009).

Where representation by counsel comports with due process. — Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally deficient nor prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, and comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense. Hampton v. State, 282 Ga. 490, 651 S.E.2d 698 (2007).

Improper instruction on presumption of innocence.

Preprinted verdict form was erroneous because the form would mislead jurors of a reasonable understanding as to the presumption of innocence and the proper burden of proof; the verdict form constituted plain error under O.C.G.A. § 17-8-58(b) because the form affected the defendant's substantial rights by actively removing the presumption of innocence from the trial. Cheddersingh v. State, 290 Ga. 680, 724 S.E.2d 366 (2012).

No due process violation because hard choices on intoxication testing. — State's failure to immediately inform a defendant of the results of the state-administered test does not create a situation where the defendant is left with no, or so little information, that he or she is denied any meaningful choice in violation of due process; driving under the influence defendants must determine, often under difficult and stressful circumstances, whether to request an independent test, and that the choice may be difficult does not render it fundamentally unfair and this fact alone does not support a due process claim. Padidham v. State, 291 Ga. 99, 728 S.E.2d 175 (2012).

Determination of voluntariness of statement by public employee. — Because the U.S. Supreme Court in Garrity v. N.J., 385 U.S. 493 (1967) employed the totality-of-the-circumstances test for evaluating whether a defendant's statement was coerced, and because Georgia courts have vast experience applying this test, the Supreme Court of Georgia adopts that test for determining whether the statements that a public employee makes during an investigation into the employee's activities are voluntary; factors a court may consider include whether the state actor made an overt threat to the defendant of the loss of the defendant's job if the defendant did not speak with investigators or whether a statute, rule, or ordinance of which the defendant was aware provided that the defendant would be terminated for failing to answer questions. State v. Aiken, 282 Ga. 132, 646 S.E.2d 222 (2007).

Statement by public employee defendant not voluntary. — Statements made by a defendant, a probation officer, as part of a criminal investigation into the defendant's conduct were not voluntary and thus could not be used at trial against the defendant; the defendant had subjective belief that the defendant could be fired if the defendant did not answer an investigator's questions, and considering a directive from the defendant's supervisors that the defendant meet with the investigator, combined with a form that the investigator had the defendant sign providing that the defendant could be fired if the defendant interfered with the investigation in any manner, the defendant's belief was objectively reasonable. State v. Aiken, 282 Ga. 132, 646 S.E.2d 222 (2007).

Adequate accommodation for defendant's hearing loss. — Defendant's

claim of a due process violation because the defendant's hearing impairment prevented the defendant from comprehending the witnesses' testimony was properly rejected. The trial court accommodated the defendant by moving the defendant closer to the witness stand and obtaining a hearing device for the defendant to use, and the defendant's conduct during the trial and statements to defense counsel indicated that the defendant was able to understand the testimony. Neugent v. State, 294 Ga. App. 284, 668 S.E.2d 888 (2008).

Defendant not prohibited from challenging state's evidence. — Defendant's claim that the defendant was denied due process because the state used "false evidence" to convict the defendant failed, because the defendant was not prevented in any way from challenging the State's evidence the defendant contended was incorrect, evidence regarding the use of cell phone records to show location, and the defendant chose not to challenge the evidence. Davis v. State, 292 Ga. 90, 734 S.E.2d 401 (2012).

Defendant did not establish Brady violation. — Under Brady, a defendant did not show that the state agreed to any sort of deal with an accomplice witness in exchange for the witness's testimony. To the extent that the witness or the witness's counsel hoped that the witness's testimony would later benefit the witness, their subjective hopes were not evidence that a deal existed; there was no evidence that the prosecutor encouraged the witness or the witness's lawyer to believe that the witness would benefit from testifying against the defendant; and the fact that the state ultimately cooperated with counsel's efforts to reduce the witness's sentence did not prove that the state and the witness had a deal prior to the defendant's trial. Varner v. State, 297 Ga. App. 799, 678 S.E.2d 515 (2009).

Due process denied where conviction procured by testimony known by prosecutor to be perjured.

Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally deficient nor prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense. Hampton v. State, 282 Ga. 490, 651 S.E.2d 698 (2007).

Court required to make findings on Mandarin Chinese speaker's competency to stand trial without interpreter. — Trial court erred in denying a defendant's motion for new trial based on the defendant's contention that the defendant did not understand the proceedings because an interpreter was not provided to the defendant without making findings; there was sufficient evidence to raise a question as to whether the defendant, whose native language was Mandarin Chinese, was competent to be tried without an interpreter, and the trial court was required to make findings as to the defendant's competency on the record. Ling v. State, 288 Ga. 299, 702 S.E.2d 881 (2010).

No due process violation in delay in defendant's arrest and indictment. — Superior court did not err in failing to dismiss the indictment on the ground that the delay in the defendant's arrest and indictment violated the defendant's rights to due process under the Fifth and Fourteenth Amendments and Ga. Const. 1983, Art. I, Sec. I, Para. I because neither actual prejudice nor deliberate adverse action on the part of the state had been shown; the defendant was not in custody during the period in question. Higgenbottom v. State, 290 Ga. 198, 719 S.E.2d 482 (2011).

11. Sentencing

Sentencer may consider mitigating factors.

O.C.G.A. § 16-5-1(d) was not unconstitutional as applied to the defendant due to an alleged lack of a mechanism or guidance for the imposition of a sentence or the provision of mitigating evidence because, while no individual determination was required to sentence the defendant in a non-death penalty case, the defendant

was allowed to submit mitigating evidence at sentencing, so the defendant's due process rights were not violated. Williams v. State, 291 Ga. 19, 727 S.E.2d 95 (2012).

12. Appeals and Habeas Corpus

Pro se motion alleging ineffective assistance unauthorized and without effect. — Habeas court erred in granting the defendant a new trial on the ground that the defendant received ineffective assistance of counsel on appeal since the defendant was not afforded defendant's constitutional right to conflict-free appellate representation because there was no impediment to trial counsel's continued representation of the defendant on appeal; because the defendant expressed defendant's contention that trial counsel's representation fell below the constitutional standard in a pro se motion defendant filed while represented by trial counsel, defendant's motion was unauthorized and without effect, and the contents of the motion were without force to support any viable claim of an actual conflict of interest on the part of counsel. Williams v. Moody, 287 Ga. 665, 697 S.E.2d 199 (2010).

17. Jurisdiction

Relation of claims to contacts. — The relationship between a Spanish corporation that owned a resort in the Dominican Republic and its contacts with Georgia — which included an Internet web site — and the negligence of a taxi driver who allegedly injured the taxi's passengers, residents of Georgia who had been vacationing at the resort, was too tenuous to permit jurisdiction over the corporation in Georgia. Sol Melia v. Brown, 301 Ga. App. 760, 688 S.E.2d 675 (2009).

Sufficient minimum contacts established. — For purposes of personal jurisdiction under the due process clause of the Fourteenth Amendment, the nonresident corporation purposefully established sufficient minimum contacts with Georgia and should have anticipated defending a suit there; the nonresident corporation established a substantial and ongoing relationship with a manufacturer by engaging in 14 transactions in six months, each of which involved contacts with Georgia. Each purchase order specified delivery by customer pickup, and the nonresident corporation allowed its customers to take delivery of the goods in Georgia; because the nonresident corporation did not pay for two of the shipments its customers picked up, it caused foreseeable injury to the manufacturer in the forum. Diamond Crystal Brands, Inc. v. Food Movers Int'l, 593 F.3d 1249 (11th Cir.), cert. denied, 131 S. Ct. 158, 178 L. Ed. 2d 39 (2010).

19. Civil Proceedings

Civil contempt order in divorce case. — A civil contempt order in a divorce case requiring a husband to pay $1,500 to the wife for each day that passed without him paying the wife insurance proceeds pursuant to an oral order did not violate due process; a trial court could sua sponte raise an issue of contempt, and although the order to pay the proceeds was oral, the order was not ineffective as a matter of law, as the husband was well aware that the payment of the proceeds would be at issue and that the trial court would decide the matter without a jury. Chatfield v. Adkins-Chatfield, 282 Ga. 190, 646 S.E.2d 247 (2007).

Equal Protection

1. In General

Mandatory attendance at school. — O.C.G.A. § 20-2-690.1 did not violate equal protection because the defendant failed to show any potential variation in application of the statute without a rational basis and the statute was reasonably related to the legitimate governmental interest of ensuring that children residing in Georgia are afforded the opportunity of an education. Pitts v. State, 293 Ga. 511, 748 S.E.2d 426 (2013).

No disparate treatment in employment situation. — Local police union local president's equal protection claim against the president's county employer, alleging that the employer treated the president differently than other officers by declining to question the president as part of the county's internal disciplinary investigation into the president's alleged com-

ments that the police chief should be replaced failed because the president did not provide valid comparators as proof of disparate treatment. Local 491 v. Gwinnett County, 510 F. Supp. 2d 1271 (N.D. Ga. 2007).

Suspended professor failed to show that he was similarly situated to other professors. — State university biology professor failed to show an equal protection violation by the university in its suspension of the professor for poor teaching, scholarship, and research, because the professor failed to show that any other professor was deficient in all three areas, although some had poorer evaluations than the professor in one of the three areas. Edmonds v. Bd. of Regents, 302 Ga. App. 1, 689 S.E.2d 352 (2009), cert. denied, No. S10C0824, 2010 Ga. LEXIS 437 (Ga. 2010).

Age classification in criminal statute of limitation tolling provision. — Supreme Court of Georgia holds that the age classification chosen in the tolling statute of O.C.G.A. § 17-3-2.2 does not violate the Equal Protection clauses of Ga. Const. 1983, Art. I, Sec. I, Para. II, and U.S. Const., amend. XIV. Harper v. State, 292 Ga. 557, 738 S.E.2d 584 (2013).

2. Statutory Classifications

DUI cases ineligible for first offender treatment. — O.C.G.A. § 40-6-391(f) did not violate equal protection under the Fourteenth Amendment or Ga. Const. 1983, Art. I, Sec. I, Para. II by excluding driving-under-the-influence offenses from First Offender Act, O.C.G.A. § 42-8-60 et seq., coverage. The defendant did not show the absence of a rational relationship between the state's compelling interest in protecting the public's safety and the classification; the defendant's equal protection argument boiled down to no more than the claim that the legislature made a bad policy judgment about which offenders should be eligible for First Offender Act treatment. Rhodes v. State, 283 Ga. 361, 659 S.E.2d 370 (2008).

The statute of repose for medical malpractice claims, etc.

The statute of repose for medical malpractice suits under O.C.G.A. § 9-3-71(b) did not violate the equal protection clauses of the federal or Georgia Constitutions. There was a rational basis for treating medical malpractice differently from other forms of professional malpractice and for the five-year repose period itself, based on the considerations that uncertainty over the causes of illness and injury made it difficult for insurers to adequately assess premiums and that the passage of time made it more difficult to determine the cause of injury. Nichols v. Gross, 282 Ga. 811, 653 S.E.2d 747 (2007).

Qualification of expert witnesses and the admissibility of expert testimony. — In a personal injury suit wherein the trial court excluded the testimony of plaintiffs' two expert witnesses upon application of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702 and 24-7-703), the trial court did not err in rejecting the plaintiffs' equal protection challenge since the plaintiffs could not establish the necessary element of an equal protection claim that the plaintiffs were situated similarly to those being treated differently. For purposes of evidentiary standards, only those accused of the same offense are similarly situated in the criminal law arena, only those asserting or defending against the same cause of action are similarly situated in the civil law arena, and the parties to civil cases are not similarly situated to those engaged in criminal prosecutions. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603 (2008).

Disability.

Trial court did not err in revoking a convicted sexual offender's probation for failing to register an address change after the offender moved into a motel because the offender failed to establish that the offender was treated differently from a similarly situated nonresident sexual offender entering the state; if O.C.G.A. § 42-1-12(e)(7) applies to a hypothetical nonresident sexual offender, that person must update his or her information within 72 hours of a change of address as required in § 42-1-12(f)(5), and any nonresident sexual offender who is required to register by virtue of the specification of § 42-1-12(e)(7) is equally subject to the requirement that he or she register a new

address within 72 hours of changing that address and equally subject to being charged with a violation. Dunn v. State, 286 Ga. 238, 686 S.E.2d 772 (2009).

4. Election and Voting Rights

Redistricting attempting to interfere with right of school board member to hold office or vote. — While voting rights and the right to run for public office are core constitutional rights, an attempted deprivation of constitutional or statutory rights is not the same as an actual deprivation. Furthermore, incurring legal fees to vindicate rights does not itself establish that those rights were violated. Thus, plaintiff, a school board member, pursing attempted violations of plaintiff's right to run and hold a designated seat in a predefined district, could not succeed as an injunction in another lawsuit and failure of preclearance interfered with the implementation of the efforts of defendants, the local voting registrars; since the attempt to deprive plaintiff of plaintiff's constitutional rights did not succeed, neither can plaintiff's lawsuit succeed. Cook v. Randolph County, 573 F.3d 1143 (11th Cir. 2009).

Use of direct recording electronic equipment does not deny equal protection. — Trial court did not err in granting the Secretary of State, the Governor, and the Georgia State Election Board summary judgment in voters' action challenging the use of direct recording electronic equipment on the ground that it denied the voters equal protection under the equal protection clause of the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. II because all Georgia voters had the option of casting an absentee ballot or using the touch screen electronic voting machines on election day, and in deciding to forego the privilege of voting early on a paper ballot, voters assumed the risk of necessarily different procedures if a recount was required; since every Georgia citizen could vote by absentee ballot or by utilizing the touch screen voting system, the voters' contention that there was some state based classification between voters was false. Favorito v. Handel, 285 Ga. 795, 684 S.E.2d 257 (2009).

Strict scrutiny review should not have been applied to plaintiff school board members' challenges under the First and Fourteenth Amendments to O.C.G.A. § 20-2-51(c)(2) because the statute's nepotism provision prohibited plaintiffs only from running for the school board in districts where certain family members were employed, but the statute did not otherwise impair plaintiffs' right to run for office or to vote; plaintiffs' injury was not so severe as to require strict scrutiny. Plaintiffs' claims that the statute was both too narrow and overbroad also failed; that the statute did not prevent nepotism in all its possible forms did not heighten the severity of the restriction to necessitate strict scrutiny. Grizzle v. Kemp, 634 F.3d 1314 (11th Cir. 2011).

5. Selection of Juries

Artistic tendencies as justification for juror striking.

Prosecutor's reason for a peremptory challenge against a student who was in graduate school in order to be a school counselor was race-neutral: the prosecutor was concerned that psychology would be a part of the defense of battered person syndrome, and the prosecutor did not want someone who would give strong credence to psychology. Demery v. State, 287 Ga. 805, 700 S.E.2d 373 (2010).

Failure to show actual under-representation of a claimed cognizable group.

Defendant's argument that Hispanic persons were misrepresented in the composition of the grand and traverse jury pools in violation of the Sixth and Fourteenth Amendments and O.C.G.A. § 15-12-40 was rejected because the defendant failed to show any actual misrepresentation of this group: the defendant's own expert witness testified that when using 2000 Census data, absolute disparity figures for Hispanics were under the five percent threshold, although when adjusted to account for the citizenship rate of Hispanic persons, the absolute disparity figure showed over-representation by 6.12 percent for the grand jury list. Thus, the absolute disparity figures were well within constitutional requirements of 10

percent. Foster v. State, 288 Ga. 98, 701 S.E.2d 189 (2010).

Record insufficient to establish prima facie case of discrimination.

Trial court's finding that the defendant failed to set forth a prima facie case of racial discrimination sufficient to support a Batson challenge was not clearly erroneous, as the defendant failed to show that the totality of the relevant facts gave rise to an inference of discriminatory purpose. Moreover, the number of strikes by the state exercised against African-American veniremen did not give rise to an inference of discrimination. Ludy v. State, 283 Ga. 322, 658 S.E.2d 745 (2008).

Race-neutral explanation for peremptory strikes.

Because the defendant was unable to rebut the state's explanation of the race-neutral reasons for the state's peremptory strike, the trial court properly denied the defendant's Batson motion. Specifically, the state explained that the state struck the juror at issue because the juror had a prison ministry, had been a character witness in a criminal case, and was related to another juror the state struck because the other juror was previously charged with aggravated assault. Boone v. State, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

Trial court did not err in denying the defendant's Batson challenge under the Fourteenth Amendment. The state explained that the state struck an African-American juror because the juror was combative and reluctant to answer the state's questions, and the defendant's argument that this was not an adequate nondiscriminatory reason for striking the juror was unpersuasive. Jackson v. State, 291 Ga. 25, 727 S.E.2d 120 (2012).

State provided sufficient race-neutral reasons for using nine of the state's 10 peremptory strikes against non-white prospective jurors, including that one stricken prospective juror worked for a group home with boys close to the defendant's age, one had multiple conflicts with the criminal justice system, and one had been falsely accused of a crime but acted in self-defense, the same legal theory advanced by the defendant. Stacey v. State, 292 Ga. 838, 741 S.E.2d 881 (2013).

Number of peremptory challenges afforded codefendants. — O.C.G.A. § 17-8-4(b), which allows defendants tried jointly 14 peremptory challenges (while O.C.G.A. § 15-12-165 allows a defendant tried alone nine such challenges) does not violate equal protection as there are valid reasons for discriminating between the peremptory challenges of single defendants and codefendants: the avoidance of undue delay and a needless burden on the public. Dixon v. State, 285 Ga. 312, 677 S.E.2d 76 (2009), overruled on other grounds, 287 Ga. 242, 695 S.E.2d 255 (2010).

6. Criminal Procedure

DNA sample collection from convicted felons. — Classification of subjecting convicted felons but not convicted misdemeanants to the DNA identification process was rationally related to the Georgia legislature's legitimate law enforcement purpose of creating a permanent identification record of convicted felons because the statute encompasses all convicted felons whose crimes and/or past histories were serious enough to warrant a sentence to confinement, as opposed to lesser punishment, and the legislature acted reasonably and not arbitrarily when the legislature focused on those convicted felons who were housed in a correctional facility where DNA samples could be efficiently and economically obtained. As a result, former O.C.G.A. § 24-4-60 (see now O.C.G.A. § 35-3-160) rationally related to the legitimate state interest the statute was intended to promote and did not violate equal protection. Quarterman v. State, 282 Ga. 383, 651 S.E.2d 32 (2007).

[Amendment XV]

Law reviews. — For article, "Education: Education's Elusive Future, Storied Past, and the Fundamental Inequities Between," see 46 Ga. L. Rev. 557 (2012). For

article, "What We Can Learn About the Art of Persuasion from Candidate Abraham Lincoln: A Rhetorical Analysis of the Three Speeches that Propelled Lincoln into the Presidency," see 64 Mercer L. Rev. 521 (2013).

JUDICIAL DECISIONS

Redistricting attempting to interfere with right of school board member to hold office or vote. — While voting rights and the right to run for public office are core constitutional rights, an attempted deprivation of constitutional or statutory rights is not the same as an actual deprivation. Furthermore, incurring legal fees to vindicate rights does not itself establish that those rights were violated. Thus, plaintiff, a school board member, pursing attempted violations of plaintiff's right to run and hold a designated seat in a predefined district, could not succeed as an injunction in another lawsuit and failure of preclearance interfered with the implementation of the efforts of defendants, the local voting registrars; since the attempt to deprive plaintiff of plaintiff's constitutional rights did not succeed, neither can plaintiff's lawsuit succeed. Cook v. Randolph County, 573 F.3d 1143 (11th Cir. 2009).

[Amendment XVI]

[Authorizing Income Taxes]

Law reviews. — For article, "Rethinking Constitutional Review in America and the Commonwealth: Judicial Protection of Human Rights in the Common Law World," see 35 Ga. J. Int'l & Comp. L. 99 (2006).

For comment, "If It Quacks Like a Duck: In Light of Today's Financial Environment, Should Credit Unions Continue to Enjoy Tax Exemptions?," see 28 Ga. St. U.L. Rev. 1367 (2012).

[Amendment XVII]

[Popular Election of Senators]

RESEARCH REFERENCES

ALR. — Validity, construction, and application of Seventeenth Amendment to United States constitution, providing for direct election of senators and filling vacancies in state's senatorial delegation, 68 ALR6th 489.

[Amendment XVIII]

Law reviews. — For comment, "Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller," see 61 Emory L. J. 1445 (2012).

[Amendment XIX]

[Woman Suffrage]

Law reviews. — For article, "Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts' Equality Jurisprudence," see 34 Ga. J. Int'l & Comp. L. 557 (2006).

[AMENDMENT XXVI]

Law reviews. — For article, "Rethinking Constitutional Review in America and the Commonwealth: Judicial Protection of Human Rights in the Common Law World," see 35 Ga. J. Int'l & Comp. L. 99 (2006).